Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

George Hofmeister and Kay Hofmeister, *Petitioners*,

v.

Cincinnati Insurance Co., *Respondent*.

On Petition for Writ of Certiorari to the
Commonwealth of Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

J. Dale Golden
Counsel of Record for Petitioners
Golden & Walters PLLC
771 Corporate Drive, Suite 905
Lexington, KY 40502
Ph. (859)219-9090
Fx. (859)219-9292

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state's supreme court's failure to grant Petitioners their de facto first right of appeal constitutes a denial of due process pursuant to the Fourteenth Amendment of the United States' Constitution?

2. Whether a state appellate judge's personal bias and potentially defamatory comments expressed in a written opinion constitute judicial impartiality as required by the Code of Judicial Ethics and the due process clause of the Fourteenth Amendment?

3. Whether it is an unconstitutional legal fiction for an attorney to be deemed to only represent the insured when the attorney's litigation conduct is controlled by the insurer?

4. Whether it is constitutional to allow jurisdictions to define an attorney's role in the tripartite relationship inconsistently so that a Plaintiff's burden of proof and the attorney-client privilege in a third party bad faith action are inconsistent among jurisdictions?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

George Hofmeister and Kay Hofmeister; Plaintiffs-Appellants;

Cincinnati Insurance Company; Defendant-Appellee;

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the Supreme Court of Kentucky and the Court of Appeals of Kentucky in this case. Because the authority of the judiciary has been exceeded and bias has tainted the judicial process, the Petitioners have been denied due process under the law.

OPINIONS BELOW

The Opinion of the Court of Appeals rendered September 26, 2008, reversing Appeal No. 2004-CA-002296-MR and Dismissing as Moot Appeal No. 2004-CA-002362,[1] was subsequently modified by the October 17, 2008 Court of Appeals Opinion which was ordered to be depublished by the Supreme Court of Kentucky's Order denying discretionary review.[2]

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to Title 28 U.S.C., Section 1257. The Supreme Court has jurisdiction to review, by petition of certiorari, "final judgments or decrees written by the highest court of a State which a

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[1] App. A, at App. 1.
[2] App. B, at App. 86.

decision could be had."[3] This principle that a state appellate court's decision is reviewable by the Supreme Court was established more than a century ago in *Gregory v. McVeigh*[4] and *Clark v. Pennsylvania*.[5] In *McVeigh*, this Court held that the Supreme Court will review judgments of inferior state courts where the state's highest court has denied review.[6] The Supreme Court reaffirmed this principle in its unanimous 1923 opinion, *American Ry. Express Co. v. Levee*. The Court held that the denial by the state's highest court to review a judgment of the intermediate appellate court renders judgment of the intermediate appellate court to be judgment of the highest state court in which a decision in the suit could be had where,

> under the Constitution of the State the jurisdiction of the Supreme Court is discretionary, and although it was necessary for the petitioner to invoke that jurisdiction in order to make certain that the case could go no farther, when the jurisdiction was declined by the state supreme court, the Court of Appeal was shown to be the

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[3] 28 U.S.C., Section 1257(a).

[4] *Gregory v. McVeigh*, 90 US 294, 305-07 (1874).

[5] *Clark v. Pennsylvania*, 128 U.S. 395, 396 (1888).

[6] *McVeigh*, supra, at 305-07.

highest Court of the State in which a decision could be had.[7]

Petitioners, George and Kay Hofmeister, were awarded a bad faith verdict of $28,405,500.00 against Cincinnati Insurance Company ("CIC") on June 1, 2004.[8] The Kentucky Court of Appeals reversed the jury verdict and found for CIC.[9] Petitioners' Motion for Discretionary Review to the Supreme Court of Kentucky was denied on May 13, 2009.[10]

Since the Supreme Court of Kentucky denied discretionary review, the decision rendered by the Kentucky Court of Appeals is the final judgment written by the highest court of Kentucky in which a decision could be had. Therefore, jurisdiction is clear and Petitioners seek review of the Opinion Reversing Appeal No. 2004-CA-002296-MR and Dismissing as Moot Appeal No. 2004-CA-002362, rendered by the

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[7] *American Ry. Express Co. v. Levee*, 263 US 19, 20-21 (1923) (Internal citations omitted); see also *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 (1968); *Cohen v. California*, 403 US 15, 17-18 (1971); *Adams v. Saenger*, 303 U. S. 59, 61 (1938); *Bacon v. Texas*, 163 U. S. 207, 215 (1896); *Sullivan v. Texas*, 207 U. S. 416 (1907); *San Antonio & Aransas Pass Ry. Co. v. Wagner*, 241 U. S. 476, 477-78 (1916); *St. Louis, Etc., Ry. Co. v. Seale*, 229 U. S. 156, 157 (1913).

[8] App. C, at App. 87.

[9] App. A, at App. 1.

[10] App. B, at App. 86.

Kentucky Court of Appeals on September 26, 2008, that was subsequently modified by the October 17, 2008, Court of Appeals Opinion.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

28 U.S.C. § 1257 provides: "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. (b) For the purposes of this section, the term "highest court of a

State" includes the District of Columbia Court of Appeals."

Kentucky Constitution §115 provides: "In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court, except that the commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law, and the general assembly may prescribe that there shall be no appeal from that portion of a judgment dissolving a marriage. Procedural rules shall provide for expeditious and inexpensive appeals. Appeals shall be upon the record and not by trial de novo."

STATEMENT OF THE CASE

The jury awarded George and Kay Hofmeister a record bad faith verdict of $28,405,500.00 against Cincinnati Insurance Company ("CIC").[11] At the bad faith trial, CIC's bad faith expert, Carl Sumner, could not explain CIC's offers in the underlying tort claim going from $25,000.00, eleven days before trial; to $150,000.00, three days before trial; to $350,000.00 on the morning of trial; and then up to $1 million five minutes later.[12] CIC's conduct is all

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[11] App. C at App. 87.

[12] The original offer of judgment eleven days before trial was for $175,000.00, but included all claims of Kentucky Farm Bureau,

the more vexing because, despite the fact that it had increased its reserves to $1 million in its June 9, 2000, Reserve Increase Memorandum, CIC did not offer the $1 million limits until the trial on October 14, 2002.

I. Factual Background

On November 3, 1998, George Hofmeister was involved in a motor vehicle collision with a vehicle driven by an employee of Dasher Express named Eugene Clark. Mr. Clark had driven for Dasher the previous day and finished his shift at 10:00 a.m. on November 3, 1998. He inadvertently took the keys and credit card associated with the commercial vehicle to his home when he left work. Dasher contacted Clark and instructed him to return the keys and credit card, despite his protests of being fatigued. Clark fell asleep behind the wheel of his vehicle as he was returning the keys and credit card, causing his vehicle to cross the centerline, striking the Hofmeisters' vehicle head on. Clark had no recollection of the accident.

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who had paid $50,000.00 in PIP and $100,000.00 as a substitution payment to preserve its subrogation claim regarding the Hofmeisters' UIM claim. Thus, CIC describes these offers in the following amounts: $175,000.00; $300,000.00; $500,000.00; and $1,000,000.00.

Mr. Hofmeister sustained serious injuries, confining him to a wheelchair for five months and then requiring him to use a walker to regain his mobility. As a result, Mr. Hofmeister's W-2 earnings decreased by approximately $5 million from 1998 to 1999. The Hofmeisters filed suit against Dasher and Clark, alleging that Clark was within the scope of his employment with Dasher. CIC's former employee, Kim Gipson, admitted that she filled out the October 29, 1999 "Auto Initiation Report," which indicated there was no question regarding coverage; that Clark, as an employee of Dasher, was going back to Dasher's premises to return the keys when he fell asleep at the wheel, striking the vehicle driven by Hofmeister; and that liability was "clear."

CIC retained attorney Murner to defend Dasher. Clark's personal carrier, Travelers, retained Wilson to defend him. CIC's Casualty Supervisor, Major, documented on May 19, 2000, that the scope of employment issue regarding Clark being within the scope of employment with Dasher at the time of the accident, "must be resolved" by the filing of a declaratory judgment action.[13] More importantly, Major documented the fact that Murner also recommended the filing of a declaratory judgment action. Major admitted that CIC's own written

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[13] Major ordered the filing of a declaratory judgment action almost 2-1/2 years before the trial date of October 14, 2002.

policy, which was introduced into evidence, required it to resolve coverage questions at the front end.

CIC's employee, Julie Sullivan, drafted a June 9, 2000 Reserve Increase Memorandum. It stated: "[h]owever, if our insured did indeed order Mr. Clark to return the keys, which it appears they did, Dan feels Dasher would be found vicariously liable and a dec action is not an option."[14] In fact, Sullivan admitted at trial: "[w]e were proceeding under the assumption that he would be found in the course and scope of his employment." Thus, CIC increased its reserve on the claim to $1 million when it concluded that Clark was in the scope of his employment with Dasher at the time of the accident and was a CIC insured. Therefore, CIC never brought a declaratory judgment action on the scope of employment issue due to the fact it, as well as Murner, had concluded that Clark was acting within the scope of his employment.

Although CIC was well aware that Clark was its insured and despite the fact that Murner participated in resolving the coverage issue, Murner filed a cross-claim on behalf of Dasher against Clark. Dasher's cross-claim against the CIC insured Clark was designed to raise questions in the minds of the

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[14] The reference to "Dan" is a reference to Dan Murner, the attorney hired by CIC to defend Dasher.

Hofmeisters and manufacture an ostensibly reasonable basis for CIC to make low-ball offers to the Hofmeisters. Proof of this course chosen by CIC and Murner is reflected in Murner's June 22, 2000 settlement offer wherein an offer is made for $109,275.00 (exclusive of KFB Liens), wherein Murner states: "[d]asher believes that it has a strong liability defense in this case in that Mr. Clark, the actual tortfeasor, was not acting within the scope of his employment with Dasher; therefore, Dasher cannot be vicariously liable for the Hofmeisters' damages, if any."

Of greater import is the fact that Murner conspicuously omitted the excess carrier, Fireman's Fund, from the proposed release.[15] CIC and Murner knew that if Plaintiffs' counsel ever learned of the $5 million in excess coverage provided by Fireman's Fund, the Hofmeisters would demand more than the $1 million limits of CIC's policy. The Hofmeisters had been led to believe that $1 million was the limit of coverage available. Plaintiffs' counsel confirmed in four separate correspondences to Murner that $1 million was the extent of available insurance coverage to Dasher.

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[15] At the conclusion of the underlying tort claim, after Murner first disclosed the fact that there was $5 million in excess coverage, he refused to pay the $1 million from CIC unless the excess carrier was included in the release.

Murner caused three continuances of the trial of the Hofmeisters' underlying tort claim. Murner attempted to blame the Hofmeisters for the delay in the case; however, Murner admitted that two years elapsed between the time he looked at all of the Hofmeister documents and the time that the $1 million offer was made.

As the trial date of October 14, 2002 approached, CIC was kept informed of the Hofmeisters' financial demise through Murner. Although the Court of Appeals seems to have accepted CIC's contention that the Hofmeisters withdrew their $1 million demand and never made another demand, this contention was contradicted twice by Murner and twice by CIC's bad faith expert, Sumner.

Sumner Testimony:

> Q6 Mr. Sumner, I want to clear one thing up right off the bat. Isn't it true that Mr. Hofmeister was demanding the policy limits of the insurance that was available throughout the entire case?

A. Yes.[16]

Murner Testimony:

Q237 But I just want to make sure that throughout the entire case it was clear to you and Cincinnati Insurance Company that Mr. Hofmeister was demanding a million dollars?

A. From - - here is how I'll say it. From the point you sent me the demand letter to the end of the case, I think it was a million dollars, okay?[17]

The Hofmeisters' financial outlook just prior to the automobile collision was so bright that Mr. Hofmeister was negotiating for a $25 million "unsecured" line of credit from Republic Bank of New York. Two of the banks loan officers recommended Mr. Hofmeister for the unsecured line of credit but, after the motor vehicle collision, the request was denied. The Hofmeisters' net worth, which was $196,713,000.00 a month after the accident, plunged to a negative $6,508,500.00 over the next five years,

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[16] TR. V, p. 86.
[17] TR. II, pp. 99-100.

with an additional $35 million judgment being granted against the Hofmeisters in favor of JPMorgan Chase Bank shortly after the trial. The Hofmeisters were denied the opportunity to recover future economic harm as the trial court refused, over the Hofmeisters' objection, to include a provision for recovery of future economic harm in the jury instructions.

On September 13, 2002, the trial court entered summary judgment, finding that Clark was acting within the scope of his employment with Dasher at the time of the accident.[18] This ruling was never contested; in fact, on October 3, 2002, Dasher stipulated liability while CIC reduced its June 22, 2000 offer of $109,275.00 (exclusive of all liens) to the amount in the offer of judgment, a net amount of $25,000.00.[19]

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[18] The Court of Appeals found the delay in settling the case was reasonable because the scope of employment issue had not been resolved. It failed to appreciate that almost 2-1/2 years earlier, CIC had already determined that Eugene Clark was in the scope of his employment. Regardless, after the summary judgment order of September 13, 2002, this issue had clearly been resolved and CIC should have immediately offered its limits of $1 million due to the fact that its bad faith expert, Carl Sumner, could not identify any changes in the case to justify the rash of settlement offers to follow.

[19] $175,000.00 inclusive of KFB's $50,000.00 PIP lien, and its substitution payment of $100,000.00 to preserve its subrogation rights in the UIM claim.

On October 14, 2002, the morning of trial, Murner presented the Hofmeisters with a correspondence indicating that a million dollars would never be offered and that the final settlement offer was "$500,000.00 inclusive of all liens/claims, to include but not limited to, KFB's claim for basic reparation benefits recovery and their putative claim for recovery of the $100,000.00 advanced to Mr. Hofmeister." The correspondence further indicated that, "[t]his offer expires when the parties announce ready at trial." The Hofmeisters immediately announced ready for trial, prompting Murner to immediately request the trial judge to give him a few minutes. Within five minutes, Murner offered the Hofmeisters $1 million to settle their claim. The Hofmeisters immediately accepted the offer. Thereafter, counsel then went back to the judge's chambers to discuss what had occurred. While in the judge's chambers, attorney Golden, for the first time, learned that there was excess coverage in the amount of $5 million.

The Hofmeisters had already been informed that the case had settled for $1 million. The Hofmeisters experienced a tremendous amount of relief upon learning that they would not have to go endure the rigors of a jury trial. Thus, after the $5 million excess coverage was disclosed, the election was made to affirm the settlement agreement and

recover damages in tort.[20] This decision turned out to be in the best interests of the Hofmeisters. The Hofmeisters' lack of knowledge of the excess carrier is corroborated by the fact that they never demanded a penny from the excess carrier nor corresponded in any manner with the excess carrier. It is beyond cavil that the Hofmeisters would have at least asked the excess carrier to contribute something since CIC's full $1 million limits was being paid. Also, it is clear that Murner had no right to demand that the excess carrier be included on the release even if he felt a bad faith claim was developing.[21]

The Hofmeisters desperately waited for the $1 million payment from CIC. Finally, Plaintiffs' counsel sent Murner correspondence, threatening that if the $1 million was not paid immediately, a motion to force CIC to pay interest would be filed

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[20] *See Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993), (Where a fraud has been perpetrated to induce a party to enter into a contract, the injured party may elect to affirm the contract and recover damages in tort for the fraud or disaffirm the contract and recover the consideration with which he has parted).

[21] The Hofmeisters introduced into evidence an October 9, 2002 email from the excess carrier, Fireman's Fund, to CIC supervisor, Dan Walsh, and attorney Dan Murner. Fireman's Fund sought to hold CIC responsible for any payment that it may have to make, because of, ". . . the fact that the Insured's defense has been potentially comprised by the failure to extend a defense to the driver at the beginning . . ."

with the Court on November 1, 2002. Therefore, it was no coincidence when on November 1, 2002, one of the Hofmeisters' judgment creditors, Allied Capital, moved to intervene in the case to assert its judgment lien that exceeded $1 million. Murner admitted in his testimony before the jury that someone from his office had contacted the attorney for Allied Capital. CIC Supervisor Walsh listened to this testimony and was asked if he stood behind Murner in the way Murner handled the case with George and Kay Hofmeister, and Walsh responded by saying, "Yes."

II. Procedural History

After the jury rendered its verdict in the bad faith trial, CIC filed an appeal with the Kentucky Court of Appeals. The Kentucky Court of Appeals rendered its opinion on September 26, 2008, more than four and half years after the appellate briefs were filed and more than eighteen months after Oral Arguments were heard.

The Petitioners, George and Kay Hofmeister, filed a Motion to Strike Portions of the Court's Opinion and requested an *En Banc* hearing. Petitioners specifically requested redaction of the following language from the Court of Appeals decision:

> Our Supreme Court has recognized that some attorneys exhibit a 'personal bias against insurance companies in favor of using bad faith and UCSPA allegations to extort payment of underlying claims from insurers.' The manner in which Mr. Golden zealously represented the Hofmeisters would not exclude him from this class of attorneys. (Internal citations omitted.)[22]

Petitioners also requested that a footnote referencing the Petitioners' attorney's representation of Mr. Clark in an unrelated matter be redacted. Footnote 12 on page 24 of the Court of Appeals unredacted opinion states as follows:

> ... Still, on the heels of the jury verdict in the case *sub judice*, Clark filed a civil action over this issue claiming CIC violated the UCSPA. *Clark v. Cincinnati Ins. Co.*, No. 2005-CA-000356-MR 2006 WL 1044461 (Ky. App. April 21, 2006). This Court in *Clark* affirmed the Fayette Circuit Court's dismissal of Clark's claim. In an example of *litigation* making strange

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[22] App. A, at App. 1.

> bedfellows, Clark's attorney was Dale Golden.[23]

The Motion to Strike Portions of the Court's Opinion was granted, and the September 26, 2008 Opinion was Withdrawn. A redacted version of the Court of Appeals Opinion was rendered October 17, 2008 and was ordered Not to be Published. The Hofmeisters filed a Motion for Discretionary Review to the Supreme Court of Kentucky, which was subsequently denied. However, the Supreme Court of Kentucky did order the Court of Appeals opinion Not Published.[24]

REASONS FOR GRANTING THE PETITION

I. The Petitioners' First Right of Appeal Guaranteed by the Kentucky Constitution Has Been Denied Based Upon Judicial Bias According To The United States' Constitution's Due Process Clause.

a. Petitioners Have A First Right of Appeal Which May Not Be Obstructed.

Pursuant to Kentucky Constitution §115, "in all cases, civil and criminal, there shall be allowed as

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[23] App. A at App. 27, footnote 12.

[24] App. B at App. 86.

a matter of right at least one appeal to another court." One appeal is guaranteed as a matter of right to ensure that no individual is forced to accept an undue punishment or erroneous verdict without receiving the opportunity to have their grievances addressed by an unbiased and impartial panel of judges whose sole goal is the proper administration of justice. The Supreme Court held in *Griffin v. Illinois*, that when a state provides one appeal as a matter of right, it cannot erect barriers to prevent parties from receiving their Constitutional right to appeal.[25] "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates."[26]

Furthermore, "at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discrimination."[27] These rights set forth by the

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[25] *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

[26] *Id.*

[27] *Id.*; *Evitts, et al. v. Lucey*, 469 U.S. 387, 393 (1985)("Nonetheless, if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin* v. *Illinois*, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.").

Supreme Court are guaranteed by the Due Process clause of the Fourteenth Amendment of the United States Constitution.

Judicial bias at the appellate level deprived Petitioners of their one appeal as a matter of right which is guaranteed by the Constitution of Kentucky and protected by the United States' Constitution.

b. Petitioners Have A Due Process Right To Be Tried By An Impartial Judge.

"A fair trial in a fair tribunal is a basic requirement of due process."[28] The Due Process clause demands that judges make rulings grounded on principles of law and not guided by their personal opinion of a party's attorney.

> The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process.

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[28] *In re Murchison*, 349 U.S. 133, 136 (1955).

> These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.[29]

The Due Process Clause has been implemented by objective standards that do not require proof of actual bias to justify recusal of a judge.[30] "In defining these standards, a court asks whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[31]

There are situations where "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable."[32] Consistent with the constitutional requirement that Petitioners be tried by an impartial judge, Kentucky Supreme Court Rule 4.300, which codifies the Canons of Judicial Conduct, mandates that a judge act without bias or prejudice. Specifically, the rule states that "a judge shall perform judicial duties without bias or prejudice. A judge shall not, in the

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[29] *Rochin v. California*, 342 U.S. 165, 170-1 (1952)(Internal citations omitted).

[30] *Caperton v. Massey Coal Co.* 129 S.Ct. 2252, 2263 (2009).

[31] *Id.*

[32] *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

performance of judicial duties, by words or conduct manifest bias or prejudice . . ."[33]

This ethical guideline is designed to ensure judges rule based upon well-established law, and not upon their personal feelings about a particular controversy, a party or a party's attorney.

Conflicts of interest and personal bias regarding a party's attorney are at times impossible for judges to avoid or predict. However, procedures exist for a judge to disqualify himself or herself. The recusal process is designed to thwart the temptation for such bias to taint a judge's impartiality. When a judge's impartiality might reasonably be questioned because the judge has a personal bias or prejudice concerning a party or a party's lawyer, the judge should disqualify himself or herself.[34]

c. The Actual Bias Upon Which the Appellate Court Based Its Opinion Violated the Petitioners' Due Process Right.

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[33] Kentucky Supreme Court Rule 4.300; Model Code of Jud. Conduct Canon 3(B)(5) (2004).

[34] Model Code of Jud. Conduct Canon 3(E)(1) & 3(E)(1)(a) (2004).

i. Actual Bias Illustrated by the Lower Court's Personal Attacks Against Petitioners' Attorney.

The language, which was ultimately redacted from the Court of Appeals Opinion, illustrates the actual bias which tainted the Court of Appeals Opinion and denied Petitioners' their first right of appeal and right to due process. The portions of the Opinion which were ultimately redacted do not provide any factual basis for the Court's other legal reasoning and do not logically flow from any of the Court's preceding or subsequent arguments. As such, this language was nothing more than a personal attack against Petitioners' attorney, and is explicit evidence of actual bias and personal animosity on behalf of the involved judges.

In the footnote redacted from the original Opinion, the Court addresses the appeal of another matter that has no legal relevance to these proceedings. Mr. Clark's subsequent representation by attorney Golden had no legal bearing whatsoever on the issues raised by the parties during the appeal. This *dictum* could be misconstrued to give the appearance that the Court was pronouncing judgment on the propriety of attorney Golden's representation of Mr. Clark.

It is evident from the court's language that it harbored ill feelings towards Petitioners' attorney; it is thus unrealistic to conclude that those feelings had no bearing on the Court of Appeals Opinion. Therefore, the Petitioners were denied their first right of appeal.

ii. Actual Bias Illustrated By Judge's Dissent To Order Striking Prejudicial Language.

Additional proof to establish that the opinion was biased is evidenced by the fact that a different, unbiased panel of the Court of Appeals struck the potentially defamatory language and the Supreme Court of Kentucky subsequently ordered the opinion not to be published. Even though the derogatory statements were removed from the Court's Opinion, that does not cure the fact that it was written by justices whose minds were clouded by their personal animosity toward Petitioners' attorney.

This rationale is further illustrated by Judge Acree's dissent from the Court's order to strike the offensive portions of the opinion. Even after having time to reflect, Judge Acree, the author of the Court's Original Opinion, was so consumed by his bias that he could not recognize that his bias had contaminated the Court's original opinion. The Supreme Court of Kentucky also disapproved of the

Court of Appeals misguided approach to the administration of justice when it ordered the Court of Appeals Opinion Not to be Published.[35]

II. The Court of Appeals Decision Highlights the Disparate Implications Created By Different Constructions of the Tripartite Relationship.

a. The "One-Client" Model.

The Court of Appeals held that the attorney-client relationship exists only between the attorney and the insured; not the attorney and the insurer. However, this holding illustrates the conflicts inherent in defining the client in the tripartite relationship and the division among the circuits in defining the tripartite relationship.

The tripartite relationship is premised on the concept of the insurance company's "duty to defend." The insured purchases liability insurance to protect him or her in the event of litigation that arises out of a motor vehicle accident. When a suit is initiated, the insurer selects and pays defense counsel to represent the insured. This relationship between the insured, the insurer and the attorney hired by the insurer to represent the insured is commonly referred to as the tripartite relationship. A conflict

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[35] App B at App. 86.

that arises in the tripartite relationship is whether the defense attorney forms an attorney-client relationship with both the insured and the insurer, or only the insured. The states that have addressed the issue are evenly split.

Twenty states have held that an attorney develops an attorney-client relationship with only the insured.[36] The states following this one-client

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[36] ABA Informal Opinion 1476 (1981); Colorado Bar Assn. Ethics Committee, Formal Op. 91 (Jan. 16, 1993); *Finley v. Home Ins. Co.*, 90 Haw. 25, 33 (1998); *Kirschner v. Process Design Assocs., Inc.*, 592 N.W.2d 707, 711 (Mich. 1999); *State Farm Fire & Cas. Co. v. Mabry*, 497 S.E.2d 844, 847 (Va. 1998); *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1137-38 (Wash. 1986); *Jackson v. Trapier*, 42 Misc.2d 139, 140 (N.Y.Sup. 1964); *American Employers Ins. Co. v. Goble Aircraft Specialties*, 131 N.Y.S.2d 393, 401 (1954); *Ingersoll-Rand Equip. Corp. v. Transp. Ins. Co.*, 963 F.Supp. 452, 454 (M.D. Pa. 1997); *First American Carriers v. Kroger Co.*, 787 S.W.2d 669, 671 (Ark. 1990); *In re Rules of Prof. Conduct & Insurer Imposed Billing Rules & Procs.*, 2 P.3d 806, 813-14 (Mont. 2000); *Baker v. CNA Ins. Co.*, 123 F.R.D. 322, 326 (D. Mont. 1988); *Givens v. Mullikin*, 75 S.W.3d 383, 395-96 (Tenn. 2002); *Barefield v. DPIC Cos.*, 600 S.E.2d 256, 259 (W. Va. 2004); Iowa Supreme Court Board of Professional Ethics & Conduct, Op. 99-01 (Sept. 8, 1999); District of Columbia Bar Assn. Legal Ethics Committee, Op. 290 (Apr. 20, 1999); Nebraska Advisory Committee, Advisory Op. 00-1; Virginia State Bar Standing Committee on Legal Ethics, Op. 598 (1985); Vermont Bar Assn., Advisory Ethics Op. 98-7 (Oct. 1998); Maine Board of Overseers of the Bar, Op. #164 (Dec. 2, 1998); State Bar of South Dakota, Ethics Op. 99-2 (Apr. 16, 1999); Ohio Supreme

rule adhere to the principle that the insured's contract with the insurer demands that the insurer provide an attorney whenever the duty to defend arises and that the attorney's sole duty of loyalty lies with the insured. *Norman v. Insurance Company of North America*, is a typical example of the logic behind states following the one-client rule.[37] In *Norman*, the Court held that an "insurer's attorney, employed to represent an insured, is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured."[38]

This rationale requires one to accept the illusion that an attorney hired by an insurer to represent the insured will only attempt to further the interests of the insured, despite the fact that the attorney is being paid by the insurer and wants to maintain a positive relationship with the insurer to ensure future employment. This inherent conflict creates a legal fiction.

b. The "Dual-Client" Model.

Court Board of Commissioners on Grievances & Discipline, Op. 2000-3 (June 1, 2000) & 2000-2.

[37] *Norman v. Ins. Co. of North America*, 239 S.E.2d 902, 907 (Va. 1978).

[38] *Id.*

Twenty-one other states have recognized this legal fiction and have, thus, held that an attorney develops an attorney-client relationship with both the insured and the insurer. This is known as the dual-client paradigm.[39] States following the dual-

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[39] ABA Formal Opinion 282 (1950); *Mitchum v. Hudgens*, 533 So. 2d 194, 199-200 (Ala. 1988); *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995); *Parsons v. Cont'l Nat. Am. Group*, 550 P.2d 94, 98 (Ariz. 1976); *Doctors' Co. Ins. Serv. v. Super. Ct.*, 275 Cal. Rptr. 674, 680-81 (Cal. Ct. App. 1990); *Long v. Century Indem. Co.*, 78 Cal. Rptr. 3d 483, 489-90 (Cal. Ct. App. 2008); Delaware State Bar Assn. Com. on Professional Ethics, Op. 1981-6 (June 12, 1981); *Amendments to Rules Regulating the Florida Bar*, 820 So. 2d 210 (Fla. 2002) (Rule 4-1.8(j)); *Rogers v. Robson, et. al.*, 392 N.E. 2d 1365, 1370-71 (Ill. App. Ct. 1979); *Illinois Mun. League Risk Mgmt. Ass'n v. Seibert*, 585 N.E.2d 1130, 1135 (Ill. App. 3d 1992); *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 161 (Ind. 1999); Oklahoma Bar Assn. Legal Ethics Committee, Ethics Op. 309 (Mar. 27, 1998); *Pine Island Farmers Coop v. Erstad & Riemer*, 649 N.W.2d 444, 451-52 (Minn. 2002); *Moeller v. American Guar. & Liab. Ins. Co.*, 707 So. 2d 1062, 1070 (Miss. 1996); *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct. of Nevada*, 152 P.3d 737, 741 (Nev. 2007); *Gray v. Commercial Union Ins. Co.*, 468 A.2d 721, 724-25 (N.J. Super. 1983); *Moritz v. Medical Protective Co. of Fort Wayne, Ind.*, 428 F. Supp. 865, 872 (W.D. Wis. 1977); *Imperiali v. Pica*, 156 N.E.2d 44, 47 (Mass. 1959); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603, 607 (Utah 2003); *Sabrix, Inc. v. Carolina Cas. Ins. Co.*, 2003 U.S. Dist. LEXIS 25515, at *5 (OR); *Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 1995 U.S. Dist. LEXIS 19882, at *16-17 (R.I.); Missouri Bar Assn., Informal Advisory Op. 940006, 950241; North Carolina State Bar Assn., 99 Formal

client model acknowledge the practical realities of the tripartite relationship.

States adopting the dual-client model find the insurer's settlement authority persuasive in refusing to ignore that the insurer may also be a client. Comment 2 to Rule 1.4 of the Model Rules of Professional Conduct establishes that every offer of settlement must be communicated to the client. The client has the sole discretion whether to accept or reject the offer. In the tripartite relationship, the insurer has the settlement authority. The insured is not consulted and has no authority to accept or reject the offer.

Therefore, in order to preserve the integrity of the Model Rules of Professional Conduct and avoid the creation of a legal fiction, the insurer should be classified as a client. Otherwise, settlement authority would be vested in a third-party payor, which is expressly prohibited by Comment 11 to Rule 1.8 of the Model Rules of Professional Conduct. The Model Rules command that when a third party is paying for the legal representation of the client, the third party payor is not to influence the decisions of the attorney or interfere with the representation of the client in any way.

Ethics Op. 14 (Jan. 21, 2000); New Hampshire Bar Ass'n Board of Governors, Ethics Op. #2000-01/05 (Nov. 16, 2000).

The source of the attorney's compensation is also indicative of who controls the relationship and may be identified as the "client." Pursuant to the duty to defend, the insurer compensates a defense attorney for his or her representation of an insured. As a foreseeable consequence, despite the dictates of the Model Rules of Professional Conduct, the attorney's loyalty will lie with the source of compensation, the insurer.

The Supreme Court of the United States must rectify the legal fiction created by the one-client model which violates the Model Rules of Professional Conduct and ignores the practical implications of the tripartite relationship.

c. The Implications of the Conflicting Models of the Tripartite Relationship

i. Agent versus Independent Contractor.

The sharp division among the states as to whether the insurer is also a client of the attorney in the tripartite relationship is of paramount importance in determining whether the attorney is an agent of the insurer or merely an independent contractor. The attorney is almost always deemed to be an agent of the insurer in states where an attorney-client relationship is recognized between

the insurer and the attorney. If the attorney has not developed an attorney-client relationship with the insurer, he/she is usually held to be an independent contractor of the insurer. Consistent with the Court of Appeals holding that the attorney's client is only the insured, the Court also held that the attorney was an independent contractor of the insurer.

Numerous states that follow the illusory one-client approach hold that since the insurer is not a client, the attorney is merely an independent contractor of the insurer for purposes of liability.[40] This rationale ignores the practical realities of the representation and permits the insurer to control practically every move of the attorney devoid of any fear of being held accountable for its actions. This characterization also removes all ethical guidelines

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[40] *Merritt v. Reserve Ins. Co.*, 110 Cal. Rptr. 511, 526-27 (Cal. Ct. App. 1973); *Aetna Cas. & Sur. Co. v. Protective Nat'l Ins. Co. of Omaha*, 631 So.2d 305, 306, (Fla. App. 1993); *Ingersoll-Rand Equip. Corp. v. Transp. Ins. Co.*, 963 F.Supp. 452, 454 (M.D. Pa. 1997); *Feliberty v. Damon*, 72 N.Y.2d 112, 119-20 (1988); *Brown v. Lumbermans Mut. Cas. Co.*, 369 S.E.2d 367, 371-72 (1990); *Brocato v. Prairie State Farmers Ins. Ass'n*, 520 N.E.2d 1200, 1203 (Ill. App. Ct. 1988); *Evans v. Steinburg*, 699 P.2d 797, 798-99 (1985); *State Farm Mut. Ins. Co. v. Traver*, 980 S.W.2d 625, 627-28 (Tex. 1998); *Mentor Chiropractic Center, Inc. v. State Farm Fire & Cas. Co.*, 744 N.E.2d 207, 210-11 (Ohio Ct. App. 2000); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 538-39 (Mass. 2003); *Ross v. St. Paul Fire & Marine Ins. Co.*, 599 S.E.2d 673 (W.Va. 2004).

established to ensure that the insurer is not placing restrictions on an attorney's practices that would violate the rights of the insured.

A similar number of states adhering to the dual-client model hold that the attorney is an agent of the insurer based on the amount of actual control the insurer exerts over the attorney. As stated above, the insurer controls the vital aspects and decisions of the attorney's representation of the insured. The insurer hires the attorney, compensates him and gives him the authority to settle. The insured is given no input regarding these key decisions of the representation. Therefore, the attorney is an agent of the insurer for purposes of liability in a third party bad faith action.

The distinction between whether the attorney is an agent or an independent contractor is important because it determines the scope of the attorney-client privilege.

ii. The Attorney-Client Privilege and the Scope of Discoverable Information.

The distinction between the one-client model and the dual-client model also implicates the scope of the attorney-client privilege. Federal Rule of Evidence 501 provides that "the privilege of a

witness... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.[41] Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.[42]

The disparate constructions of the tripartite relationship, however, create differences among what communications may be deemed privileged pursuant to the attorney-client privilege. Under the one-client model, only communications between the insured and the attorney are privileged. However, pursuant to the dual-client model, communications between the attorney and the insured and the attorney and the insurer may also be privileged. Consequently, different communications are privileged in different jurisdictions depending on the model adopted to interpret the tripartite relationship.

iii. Plaintiff's Burden of Proof.

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[41] 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961).

[42] *Upjohn Co. et. al. v. United States et. al.*, 449 U. S. 383, 389 (1981).

The one-client versus dual-client determination is vitally important in a third party bad faith action where a plaintiff has the burden of proving an insurer's bad faith in refusing to settle a claim. States applying the dual-client model reason that since the attorney is an agent of the insurer, the acts of the attorney can bind the insurer for purposes of liability.[43] Therefore, in those situations, the plaintiff can show bad faith on the part of the attorney. On the other hand, if the attorney is an independent contractor, the plaintiff must prove bad faith on behalf of the insurer. The fiction created by the independent contractor status gives an added layer of protection to the insurer which has the perverse incentive to hire unscrupulous attorneys as a shield against liability.

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[43] *Nat'l Farmers Union Prop. & Cas. Co. v. O'Daniel*, 329 F.2d 60, 65 (9th Cir. 1964); *Smoot v. State Farm Mut. Auto. Ins. Co.*, 299 F.2d 525, 530 (5th Cir. 1962); *Boyd Bros. Transp. Co. v. Fireman's Fund Ins. Cos.*, 729 F.2d 1407, 1410-11 (11th Cir. 1984); *Pacific Employers Ins. Co. v. P.B. Hole Co., Inc.*, 789 F. Supp. 1117, 1122-23 (D. Kan. 1992); *Cont'l Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 294 (Alaska 1980); *Stumpf v. Cont'l Cas. Co.*, 794 P.2d 1228, 1231-32 (1990); *Safeco Ins. Co. v. Ellinghouse*, 725 P.2d 217, 225 (Mont. 1986); *United Farm Bureau Mut. Ins. Co. v. Groen*, 486 N.E.2d 571, 574 (Ind.Ct.App. 1986); *Hinshaw v. Board of Comm'r of Jay Co.*, 611 N.E.2d 637, 640-41 (Ind. 1993); *Givens v. Mullikin*, 75 S.W.3d 383, 395-96 (Tenn. 2002); *Trau-Med of Am. Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 697 (Tenn. 2002).

Due to the disparity among jurisdictions in defining the tripartite relationship and the implications created by the approach adopted by a jurisdiction, one clear national rule is necessary to ensure justice for all.

CONCLUSION

The Hofmeisters' due process rights were violated because they were deprived of their first right of appeal. Their due process rights were further violated because of the overt bias and prejudice exhibited by two members of the three member panel of the Kentucky Court of Appeals. Surprisingly, other than the redaction of the original Court of Appeals Opinion, there have been no other statements or acts by the Kentucky Court of Appeals or Kentucky Supreme Court condemning the inappropriate conduct.

By finding that Murner was an independent contractor, the Kentucky Court of Appeals was able to negate liability on the part of CIC. This fiction ignores the realities of the tripartite relationship that is commonly known. Insurers should not be immunized from liability for the conduct of the attorneys they choose to represent the insureds. To the contrary, an agency relationship provides incentives to insurers to hire scrupulous attorneys that will be careful in their representation of the

insured so as not to cause liability to the insurer. To allow an insurer to be immunized from liability by the fiction created by the independent contractor status of attorneys in some states would allow the insurer to focus more on the dollars saved rather than the propriety of the legal representation. Making the attorney the agent of the insurance company will only ensure greater accountability and fairness.

Petitioners respectfully request the petition for writ of certiorari be granted.

Respectfully submitted,

GOLDEN & WALTERS, PLLC

/s/ J. Dale Golden

J. Dale Golden
Counsel of Record
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
Ph. (859)219-9090
Fx. (859)219-9292

Counsel for Petitioners

August 10, 2009.

APPENDIX A

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2004-CA-002296-MR
AND
NO. 2004-CA-002362-MR

CINCINNATI INSURANCE COMPANY — APPELLANT/ CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM
SCOTT CIRCUIT COURT
v. HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 00-CI-00030

GEORGE HOFMEISTER AND KAY HOFMEISTER — APPELLEES/ CROSS-APPELLANTS

OPINION
REVERSING APPEAL NO. 2004-CA-002296-MR
AND
DISMISSING AS MOOT APPEAL NO. 2004-CA-002362-MR

** ** ** ** **

BEFORE: ACREE AND KELLER, JUDGES; KNOPF,[1] SENIOR JUDGE.

ACREE, JUDGE: This is the appeal and cross-appeal of a judgment entered in Scott Circuit Court after a jury found Cincinnati Insurance Company (CIC) liable to George and Kay Hofmeister for fraudulent misrepresentation and for violation of the Kentucky Unfair Claims Settlement Practices Act (UCSPA), Kentucky Revised Statutes (KRS) 304.12–230. CIC appeals the trial court's denial of its motions for summary judgment, motions for directed verdict and judgment notwithstanding the verdict, and entry of judgment awarding the Hofmeisters $10,000,000 in compensatory damages and $18,405,500 in punitive damages following a jury verdict. Prior to appeal, the trial court amended the judgment by reducing the punitive damages award to $10,000,000. The Hofmeisters filed a cross-appeal, challenging the reduction of the punitive damages award. We reverse the judgment and dismiss the Hofmeisters' cross-appeal as moot.

This case requires examination of a myriad of relationships and duties, some created by contract, others by statute, and still others by common law. It requires examination of settlement negotiations and litigation strategy and tactics, nearly all of which was placed in the hands of a jury to assess. Understanding this case necessitates a detailed

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[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

examination of a voluminous record which we will abbreviate wherever possible.

I. Facts and Procedure

The facts of the underlying automobile claim, which the jury found CIC settled unfairly, began at 10:00 a.m. on November 3, 1998. Eugene "Gene" Clark, a delivery driver for Dasher Express, Inc., had finished a workshift that exceeded ten hours. He returned his employer's vehicle to Dasher's offices in Lexington, Kentucky. He then drove home to Frankfort in his personal vehicle.

Clark was fatigued when he arrived home and discovered that he still had in his possession the company's credit card and the keys to his company's vehicle. He called Dasher's offices, informed the dispatcher of his mistake, and "indicated he was going to return the keys to Dasher." (Trial Court's Opinion and Order, September 13, 2002, p.2, quoting testimony of Dasher employee). Clark took a shower and changed clothes. Then he got back in his personal vehicle and left his Frankfort home. Ostensibly, his sole purpose was to return the Dasher vehicle keys and credit card.

George Hofmeister was driving his own vehicle and talking to his wife on a cell phone when he first saw Clark's vehicle approaching him from about a quarter-mile away. Clark's driving was erratic. In fact, Clark had fallen asleep despite having gone to a McDonald's restaurant for coffee. As the vehicles approached one another, Clark's vehicle crossed the centerline. Hofmeister slammed on his brakes but

did not avoid the collision. Whether it was possible to have done so was never determined in the record.[2]

When Clark did not arrive at Dasher's offices after indicating he was going to return the keys, a Dasher employee called his telephone number and

> le[ft] a message for Gene, indicating whether or not he was returning the keys and when they or whomever [sic] was returning the keys would have them to Dasher. After that, we received a call that Gene had been in an accident and basically were waiting to see how he was and, you know, what the situation was.

(Trial Court's Opinion and Order, September 13, 2002, p.2, quoting testimony of Dasher employee).

The accident did not occur on the most direct route between Clark's home and Dasher's offices. Clark said the direct route he regularly took would have placed him on Interstate Highway 64 (I-64) all the way from Frankfort until he exited the highway southbound at the Newtown Pike exit in Lexington. But the accident site was on US 62 in Georgetown, Kentucky. This location necessarily required Clark to exit I-64 about halfway between his home and Dasher's offices, and to head away from his business

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[2] Mr. Hofmeister testified in the bad faith trial, however, that there was no place for him to exit the road on which the accident occurred.

destination. Clark was rendered unconscious by the accident, and said he did not recall exiting I-64 onto US 62 or why he did so.

Hofmeister's injuries were significant. He convalesced for a total of eight months, confined to a wheelchair for five of those months. During that time, Hofmeister engaged attorney Dale Golden to assist in recovering his damages.

Golden concentrated his settlement efforts on Clark and Clark's insurer, the Travelers Insurance Group. Travelers offered to pay Hofmeister its policy limits of $100,000. Pursuant to KRS 304.39-320(3), Golden sent notice of Travelers' offer to Hofmeister's underinsured motorist (UIM) coverage insurer, Kentucky Farm Bureau Mutual Insurance Company, whose policy limits were also $100,000. Farm Bureau elected to preserve its subrogation rights against Clark and substituted its own payment of $100,000 to Hofmeister under the procedure outlined in *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1983). Additionally, Farm Bureau paid $50,000 in personal injury protection (PIP) benefits to Hofmeister's medical providers. Hofmeister did not waive his right to file a civil action against Farm Bureau, and he subsequently did so.

The complaint first named Clark as a defendant. The second defendant identified was Farm Bureau. The claim against Farm Bureau sought to collect an additional $100,000 in UIM benefits available under any and all of the Hofmeisters' policies. Finally, the complaint named Dasher, asserting that Clark was acting within the

scope of his employment at the time of the accident and, therefore, Dasher was vicariously liable.

Service of the complaint was Dasher's first notice that the Hofmeisters were asserting any claim against the company. Consistent with duties created by its contract of insurance, Dasher notified CIC of the claim. CIC's duty under the same contract was to provide a defense at its cost. To satisfy that duty, CIC made financial arrangements with attorney Dan Murner to answer and defend Dasher against the Hofmeisters' claims.

Murner drafted and served Dasher's answer to the complaint on November 4, 1999, asserting, among other defenses, that Clark was not acting within the scope of his employment at the time of the accident, and that Hofmeister was comparatively negligent. Murner simultaneously served discovery requests upon Hofmeister seeking information substantiating the damages claimed and the basis of Dasher's alleged liability.

The Hofmeisters responded to Dasher's discovery requests four months later, on March 3, 2000. The responses provided scant information upon which Dasher could assess its exposure to liability. On the contrary, they show the Hofmeisters: (1) had not yet compiled a list of medical expenses; (2) had not yet decided what witnesses to call at trial; (3) did not know what documents they intended to introduce at trial; and (4) were not prepared to identify any expert, including one who would testify regarding Mr. Hofmeister's claim for economic losses, or otherwise. Furthermore, in response to Dasher's

request pursuant to Kentucky Rules of Civil Procedure (CR) 8.01(2) that damages be specified, the Hofmeisters replied that "[a] total has not been calculated at this time."

The Hofmeisters, too, engaged in discovery. On February 1, 2000, they submitted interrogatories and requests for production of documents to Dasher. Consistent with a pattern repeated throughout this litigation, the Hofmeisters did not ask Dasher to produce insurance information in accordance with CR 26.02(2).[3]

In the meantime, Dasher noticed Hofmeister's deposition to be taken on May 12, 2000. Mr. Hofmeister's deposition testimony was the first indication Dasher had that Hofmeister was claiming a loss of income equaling or exceeding $5 million. When questioned about substantiation for this loss, Hofmeister explained that the primary entity through which he conducted his business, American Commercial Holdings, Inc. (ACH), had paid him a $5-million bonus for the year of the accident, but did not pay him any bonus the next year.[4]

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[3] CR 26.02(2) states:

> A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

[4] As the CEO of ACH, Mr. Hofmeister largely controlled his own income. He testified that his salary the year after the accident actually increased from $577,402 in 1998 (10 months

Hofmeister's deposition testimony showed that while he did receive a Form W-2, he was not a typical employee. He was a self-made entrepreneur. Through various business entities he had created, including ACH, Hofmeister made a career of purchasing troubled businesses, obtaining financing to keep the businesses afloat, and then reselling the businesses for a profit. Between 1995 and 1999, Hofmeister and ACH acquired approximately sixty (60) businesses. Hofmeister stated that he accomplished these acquisitions after obtaining bank financing to do so. At deposition, he testified that he had been turned down for a $25-million loan as a direct result of the accident and his injuries. Consequently, so he testified, he was unable to purchase more distressed businesses for resale. He had no documentation with him at the deposition

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of which preceded the accident) to $621,135 in 1999. The Hofmeisters' tax returns show that 1998 was a good year for Mr. Hofmeister to take a $5-million bonus because his capital losses and Schedule E losses (from other partnerships and subchapter S corporations including ACH) exceeded $8 million. When those losses were deducted from his total income, including the $5-million bonus, the Hofmeisters' adjusted gross income (AGI) was less than zero (-$443,102). Consequently, the Hofmeisters paid no taxes in 1998. In 1999, the year after the accident, the Hofmeisters' businesses netted substantial capital gains resulting in an AGI of more than $9.5 million, and a tax liability of more than $1.8 million. Awarding himself any bonus in 1999 would have yielded an even higher tax burden. In 2000, Mr. Hofmeister's salary was again above $500,000. Also in 2000, and in 2001 and 2002 as well, the Hofmeisters continued to earn substantial capital gains. Those gains, however, were offset by greater Schedule E losses from other partnerships and S corporations, including the Hofmeisters' interest in equine partnerships.

that would have substantiated any of his prior acquisitions or sales, or any of his business activity at all. Nor could he document the denial of his $25 million loan application or the potential business acquisitions the loan would have facilitated. However, he agreed to later provide Dasher with that documentation through his own attorney.

Hofmeister's attorney, Golden, took the face-to-face opportunity immediately following Hofmeister's deposition to propose settlement. After the Hofmeisters departed, Golden sat down with Murner and Dasher's owners and verbally demanded $1,500,000 on behalf of his clients.[5] According to Murner's uncontradicted testimony, Golden said "[Y]ou don't want an excess verdict, you'd better settle this case." Once Golden had departed, Murner's clients asked him what was meant by an "excess verdict" and Murner explained it to them. What followed this meeting was a series of extrajudicial correspondence upon which much of the Hofmeisters' claim of fraud and bad faith rests.

On May 18, 2000, Murner wrote to Golden requesting further substantiation of Hofmeister's claim that his business losses were attributable to the accident and stating that such information was essential to a proper assessment of Golden's settlement demand. Murner also noted that the demand was "in excess of the policy limits provided

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[5] Though Golden informally stated he could establish damages of $20,000,000, no demand higher than $1,500,000 was ever made.

by Dasher's insurance carrier[.]" He never stated what those policy limits were except to say that $1,500,000 exceeded them.

On May 22, 2000, Golden wrote to Murner "a little surprised that $1,500,000 is in excess of the policy limits of Dasher's insurance carrier." He declined Murner's request for additional support for Hofmeister's losses, stating, "The tax returns I have provided to you contain more than adequate information to show" Hofmeister's loss. He expressed his opinion that a "claim for punitive damages against Dasher alone could exceed $1,000,000." Nevertheless, based upon Murner's representation that $1,500,000 exceeded Dasher's liability policy limits, Golden agreed to recommend to Hofmeister "that he accept the amount of $1,000,000, *which I assume* from your correspondence is the policy limit." (Emphasis supplied).

Because Golden was unable to contact Mr. Hofmeister until early the next month, Golden agreed to extend the offer until June 9. Golden stated that if settlement was not accomplished by then, he would recommend that his client not accept less than $1,500,000. "In other words," Golden said, "assuming that Dasher has $1,000,000 in coverage, this is your one opportunity to resolve this matter within the limits of coverage."

The next day, May 23, 2000, Golden and Murner spoke by telephone. Based on that conversation, Golden wrote Murner again, agreeing to a short extension of the deadline for Dasher's response to his settlement demand. Golden also

asked Murner to let him know "what additional information you will need and I will try to provide" it. He then reiterated that if Dasher did not agree to settle the claim for $1 million, "our demand will increase beyond the limits of Dasher's liability policy[.]"

One day later, May 24, 2000, Murner provided a list of information he needed to assess the claim and settlement demand, limiting the list to information Hofmeister already agreed in his deposition to provide through Golden. Among other things, this included: a list of Hofmeister's companies identifying those he purchased and sold in the previous five years, with the cost of acquisition and profit realized on resale; documentation relating to the denial of his $25-million loan application; quarterly earnings reports for three of Hofmeister's corporations; and an accounting of Hofmeister's 1999 income.

On May 26, 2000, while waiting for Golden's response, Murner sought to file a protective cross-claim against Clark. On behalf of Dasher, Murner continued to assert that Clark was not acting within the scope of his employment at the time of the accident, but claimed the right of indemnification from Clark should that issue be determined otherwise. The Hofmeisters initially objected to Dasher's motion to file the cross-claim, but soon after withdrew the objection.

On May 31, 2000, the Hofmeisters served upon Dasher a second set of interrogatories and requests for production of documents. Despite Golden's being

"a little surprised" that the initial demand exceeded policy limits, the discovery still did not include a request to provide insurance information.

Also on May 31, 2000, Golden wrote to Murner again. He enclosed a copy of an amended complaint alleging that Dasher had violated federal Department of Transportation regulations prohibiting drivers to spend more than ten consecutive hours on the road without an eight-hour break. Based on that alleged violation, the proposed amended complaint demanded punitive damages be assessed against Dasher. Golden stated he would file the amended complaint if the case was not settled by June 22 for $1,000,000.

Golden's correspondence did not provide the documentation Murner requested, but did say that he had sought it from "Mr. Hofmeister and he will be providing that information to my office within the next few days." Golden also confirmed for Murner that Mr. Hofmeister agreed "to lower his demand to $1,000,000, which, according to you, is the policy limit of Dasher's insurance." Nothing in the record supports Golden's assertion that Murner had confirmed what Golden had previously assumed – that the limit of Dasher's automobile liability insurance policy was $1,000,000.

On the contrary, according to Murner's testimony, a telephone conversation took place around this time during which he conveyed to Golden the information regarding Dasher's policy of excess insurance coverage. Murner initially told Golden, as he had been told by Dasher, that those policy limits

were $3 million. Later, Murner learned that the policy limits were not $3 million, but $5 million. Following a hearing on a procedural motion in Scott Circuit Court, Murner conveyed that corrected information to Golden. There is no evidence in the record that impugns Murner's testimony.

Back at CIC's offices, senior claims examiner Julie Sullivan was developing a sense of the claim against CIC's insured, Dasher. Her role was to evaluate the claim based on information provided by Dasher's counsel. On June 9, 2000, she created a "Reserve Increase Memorandum," introduced at trial as Plaintiffs' Exhibit 5, stating:

> Information is sketchy at this time. . . . The claimant, George Hofmeister, DOB unknown, was in a wheel chair for five months and he had physical therapy. He was unable to conduct his business [but] is back to work now. His attorneys say he will likely need to have a joint replacement of his knee and hip. . . . His meds total around $100,000.

Hofmeister's economic circumstances, as well as a settlement demand in excess of Dasher's insurance coverage through CIC, also concerned Sullivan.

> Mr. Hofmeister is literally "worth millions." We have his tax returns [showing he did not receive a $5M bonus] which plaintiff may attribute to this accident. Dan [Murner] will meet

> with an accountant to review all this documentation. . . .
>
> In mid May a settlement demand of $1.5 million was initially proposed in the presence of Dasher officials. They immediately became very concerned due to personal exposure. . . . At that time, the issue of accepting the demand and tendering our limit of $1M, limiting the personal exposure of the insured to half a million versus potentially exposing them to millions was problematic due to coverage issues involved.

The coverage issues to which she referred included the fact that "Clark's personal carrier, KY Farm Bureau, tendered their $100,000 limits [and] some question regarding KY Farm Bureau stacking their coverage up to $600,000." Sullivan noted that "while the insured [Dasher] has an umbrella policy, it is not through CIC." This is the earliest indication in the record that a policy of excess insurance coverage existed. Still, neither the carrier nor the policy limits was identified.

On the other hand, Sullivan noted that there was still a question of Dasher's liability. The case had not developed far enough to know "whether Mr. Clark was on or off the clock." At that time, legal focus was on whether the "actions of Mr. Clark occurred outside the time restrictions of his employment."

As it turned out, Hofmeister's representations of his impaired physical condition were overstated. According to his pretrial disclosures in the spring of 2004, Hofmeister's medical expenses never totaled more than $50,037.92, far from the $100,000 to which he had testified. Also, Hofmeister never needed subsequent surgery or any other substantial medical treatment for his injuries. His pretrial disclosures placed a zero-dollar value on future medical costs. Nevertheless, for a time at least, the parties proceeded on Hofmeister's erroneous representations.

Meanwhile, the Hofmeisters, through Golden, had provided to Murner some documentation of Hofmeister's finances. However, according to a June 16, 2000, letter from Murner to Golden, there was still much requested documentation that had yet to be provided. Notably, there was no documentation of the $25-million loan application or its denial. An accounting expert hired on behalf of Dasher reported to Murner that the information Hofmeister had thus far provided only supported the conclusion that his businesses were losing money even before the accident. From 1995 to 1999, the cost of acquiring the businesses exceeded the cash generated by all of Hofmeister's businesses by $150 million. Dasher's expert could not reconcile Hofmeister's claim that his economic loss was attributable to the accident without additional documentation. He specifically requested documentation to support Hofmeister's income calculations, as well as records of intercompany loans and other subsidization of the losses shown to have been sustained by Hofmeister's equine-related and other businesses. Murner

explained to Golden the reason such detailed information was necessary:

> As you know, this is not a W2 economic loss case. Your client derives his income from a myriad of sources, which we need to explore. If this cannot be accomplished by June 22 [Golden's settlement demand deadline], so be it. However, my client will not act on blind faith as you suggest. . . . [I]f you take out the economic claims and simply size this case up on medical expenses (past and future) and pain and suffering (past and future) the numbers do not come close to the limits of my client's insurance policy. For example, everything you have provided to us show [sic] medical expenses of approximately $50,000 rather than the $100,000 claimed by your client during deposition. . . . Your client is asking . . . me to assume without documentation that his economic losses make up the difference and exceed the policy limits . . . .
>
> I, of course, will put all of this in a formal request for production of documents. However, the deadline for your response [to that discovery request] will fall after the deadline your client has arbitrarily imposed [to respond to the settlement offer].

Golden responded to Murner on June 20, 2000, that "Cincinnati Insurance Company has known about the claim since October 1999. . . . A cursory review of any of Mr. Hofmeister's tax returns for the past five years would reveal to the layman that he has a solid basis for his economic damages claim." Golden declined to send Murner any further medical records to support a claim for future medical costs stating simply that "Cincinnati Insurance Company is creating additional requests for information to serve as the basis for its refusal to settle this claim."[6] Furthermore, Golden charged CIC with failing to timely investigate and pay the claim, and with asking "for more information than the court would ever require Mr. Hofmeister to produce and that would take us several months to acquire." He then stated his intention "to hold Cincinnati Insurance Company responsible."

On June 21, 2000, Murner spoke by telephone with Golden and invited him to his office to discuss settlement. Golden declined the invitation. Murner therefore had a settlement proposal hand-delivered to Golden's office on June 22, 2000. There were several aspects to the settlement proposal.

First, because the issue of whether Clark was acting within the scope of his employment at the time of the accident had not been resolved, Murner pointed out the possibility that Dasher would have no liability whatsoever. Additionally, Murner's

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[6] The record reflects that no such medical records existed and, therefore, none could be sent.

interpretation of the discovery produced thus far suggested some comparative liability on Mr. Hofmeister's part.

Second, because Hofmeister still had not provided the documentation Murner requested, both informally and through discovery, Hofmeister's claim for lost business earnings could not be properly assessed. Therefore, the settlement offer specifically reserved Hofmeister's right to pursue "any claim the Hofmeisters may have against Dasher for damages due to lost wages, or lost profits due to lost business opportunities[.]"

Third, Murner totaled "all of Mr. Hofmeister's medical expenses provided to Dasher by Plaintiffs' counsel to date," then subtracted "expenses previously paid for PIP [personal injury protection of $50,000]" by Hofmeister's own insurance. The balance was $9,275.[7] Dasher agreed to pay that sum and further agreed, having obtained CIC's consent, that CIC would "be responsible for negotiating any settlement for PIP, for expenses incurred as of the date of this settlement."

Fourth, Dasher agreed to pay Hofmeister $25,000 for future medical treatment despite the fact that "no medical evidence has been presented by the

[7] These figures indicate that Murner continued to err in favor of Hofmeister regarding calculation of medical expenses since his estimate exceeds Hofmeister's pretrial disclosure by more than $9,200.

Hofmeisters' counsel regarding Mr. Hofmeister's need for future medical treatment[.]"

Fifth, recognizing Mrs. Hofmeister's "role in caring for Mr. Hofmeister[,]" Dasher agreed to pay her $25,000 on her loss of consortium claim

Sixth, for Hofmeister's claim of past and future pain and suffering, Dasher agreed to add $50,000 to the $100,000 previously received from Clark's carrier making his pain and suffering claim about three times his medical expenses.

In effect, Dasher's total offer was $109,275, plus indemnification for the $150,000 previously paid by other insurers for a total of $259,275, plus the important reservation of Hofmeister's right to pursue his claim for lost income.

Before the workday ended, Golden, on behalf of the Hofmeisters, wrote to Murner stating that the "proposed settlement offer is rejected and that we hereby withdraw our offer to settle this matter for the policy limits of $1 million." Golden gave no credence to Murner's asserted defense that Clark was not acting in the scope of employment for Dasher, stating, "I have already presented to your office the applicable case law that clearly indicates Mr. Clark was acting within the scope of his employment[,]" and insisting that taking a contrary position "is a clear violation of the Unfair Claims Settlement Practices Act because liability has become clear." Similarly, according to Golden, Murner's position that Hofmeister might bear some percentage of fault "constitutes a violation of the

Unfair Claims Settlement Practices Act." Finally, and contrary to the offer to reserve the claim for lost profits, Golden claimed that while Murner acknowledged a "viable claim for lost wages, lost profits, and lost business opportunities, [he] did not offer a dime to settle that portion of our claim. This, too, is in violation of the Unfair Claims Settlement Practices Act."

Settlement negotiations were thus suspended. Negotiations would not resume in earnest until the issue of Dasher's vicarious liability was determined by the trial court. This did not occur until shortly before the final date set for the trial, October 14, 2002.

Between these two periods of settlement negotiation – the summer of 2000 and autumn of 2002 – substantial discovery took place as well as a variety of procedural and other motions. The following events, including extrajudicial events subsequently memorialized as part of the record, are relevant to our review.

On February 9, 2001, Golden wrote a peculiar letter[8] to Murner ostensibly attempting to settle one portion only of his clients' claims. The letter did not present any *offer* to settle. On the contrary, Golden was attempting to resurrect and accept one portion of

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[8] The oddity of Golden's letter surpasses the "curious letter" described in *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 495 (Ky. 1976), which is similar to some of Golden's other correspondence.

Dasher's June 22, 2000, offer that Hofmeister rejected *in toto* eight months earlier. With still no proof of future medical expenses, Golden, on behalf of the Hofmeisters, wanted now to accept that portion of Dasher's previous offer. He wanted Murner to explain the "decision to withdraw the offer of settlement of $25,000[.]" He also wanted to know why Hofmeister could not accept one portion of the offer without accepting the other portions. In Golden's opinion, this violated Kentucky's UCSPA. Using the same wording as KRS 304.12-230(13), Golden claimed this amounted to "failing to promptly settle a claim where liability has become reasonably clear under one portion of the insurance policy coverage in order to influence settlement under another portion of the coverage afforded by [CIC]."

Murner replied on February 15, 2001, documenting the history of Dasher's offer and Hofmeisters' rejection, and quoting Golden's June 2000 pronouncement that "[w]e will now proceed to trial and have the jury decide the issue of damages." Again, Murner insisted that liability was not as clear as Golden asserted and reminded Golden of the difficulty Dasher had in obtaining from Hofmeister sufficient information to assess his claim of lost profits. Finally, Murner stated, "I believe your allegations of bad faith that you have thrown about throughout this litigation are frivolous."

More than three years later, when Golden interrogated Murner at trial regarding this episode,

Golden revealed that his February 9, 2001, letter was a calculated attempt to put Murner "on the spot."[9]

> Golden: You admitted you shouldn't have made that offer. You admitted it was a sham. . . . I put you on the spot on the $25,000 you offered in future medicals, to show that that was just a sham.
>
> Murner: I did not admit it was a sham. . . . You rejected the whole $109,000 . . . . And then six [sic] months later you said, oh well, I'll

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[9] On this point, Golden interrogated Murner, CIC representative Dan Walsh, and CIC's bad faith expert Carl Sumner. The essence of Golden's interrogation and argument is that: (1) the June 22, 2000, offer included $25,000 for future medical expenses; (2) there was no change in the medical proof between June 22, 2000, and February 9, 2001, when Golden "accepted" the offer, so the offer could not have become less justifiable; (3) despite this, CIC refused to pay over the $25,000; (4) Murner admitted that the $25,000-offer should not have been made; and (5) Murner's admission supported Golden's claim that it was a sham offer all along and, therefore, made in bad faith. This argument fails fundamentally since there was never any evidence of the need for future medical care. Murner's settlement recommendation to Dasher, and CIC's approval of the settlement offer for future medicals, was based on Golden's representation that he would eventually present such evidence. Golden attempts to make Murner and CIC the culprits because they relied on his representations in making the offer. The argument defies logic.

> take the $25,000 that you were offering for medicals, and I said you already rejected the offer and you hadn't proved anything regarding future medicals, so why would I go there?

The Hofmeisters continued to engage in discovery between the summer of 2000 and autumn of 2002. They served additional requests for production of documents and a third and fourth set of interrogatories on Dasher in September 2000 and May 2001, respectively. Again, the Hofmeisters never took advantage of the discovery process to obtain information regarding Dasher's insurance coverage.

Dasher, too, continued efforts through discovery to obtain Hofmeister's financial records so it could assess whether there was a causal relationship between the accident and Hofmeister's business failures. The trial court permitted such discovery even over Golden's motion for a protective order. Even then, Dasher subsequently found it necessary to obtain the trial court's order compelling production of this documentation before Hofmeister would produce it.

On July 19, 2001, through Golden, the Hofmeisters moved to amend their complaint for a second time. They did not attach a copy of the proposed amended complaint to the motion, but stated their intent to assert a claim against CIC for violation of the UCSPA. Through Murner, Dasher moved the trial court pursuant to CR 11 to strike the

motion as frivolous, having been filed for the improper purpose of attempting to force settlement of the underlying claim. Primarily, Dasher noted that its liability was still fairly debatable since no decision had yet addressed the scope-of-employment issue. Dasher also asserted that the Hofmeisters had continuously thwarted its efforts to substantiate their economic losses. The trial court granted the Hofmeisters' motion to amend the complaint and deferred a ruling on Dasher's CR 11 motion.

The second amended complaint listed a variety of grievances against CIC, each of which the Hofmeisters contended constituted a violation of the UCSPA. Shortly thereafter, the Hofmeisters amended the complaint again, adding an additional UCSPA claim against CIC. Now itself a defendant, CIC answered the two amended complaints and denied each of the substantive allegations in both.

In September 2001, the trial court agreed with CIC that the case against it for bad faith should be bifurcated from the underlying tort claim and entered an order to that effect. Attorney Michael Risley entered his appearance on behalf of CIC. The underlying tort claim went forward.

On March 15, 2002, Dasher took the deposition of a representative of the bank where Hofmeister had applied for and had been denied the $25-million loan. The bank representative acknowledged that he recommended Hofmeister's loan application to his superiors, but stated they ultimately denied the loan. He said that Hofmeister's medical condition following the accident did not

affect either his recommendation or his superiors' denial of the application for credit. He testified, "I don't recall it being woven into the credit presentation as an issue we had to deal with[.]" Instead, "the final decision" to reject was based on "economic issues with his businesses, his horse business and other businesses, that he had that brought in risk factors that the bank [was] not willing to accept[.]" Nothing in the record indicates that the accident had any effect on the bank's denial of Hofmeister's application for a $25-million loan.

Trial was scheduled for the spring of 2002. Both the Hofmeisters and Dasher submitted proposed jury instructions that left the issues of Dasher's vicarious liability and Hofmeister's comparative negligence for resolution by the jury. For reasons which the Hofmeisters opposed but are not otherwise pertinent here, the trial was continued and eventually rescheduled for October 14, 2002.

The critical issue of whether Clark was acting in the scope of his employment was still not resolved when, between August 30 and September 4, 2002, the Hofmeisters, Clark and Dasher each filed motions on this issue. On September 13, 2002, the trial court entered an order finding that Clark was acting in the scope of his employment with Dasher.

There was conflicting evidence as to whether Dasher's dispatcher *ordered* Clark to return the keys and credit card himself that morning, or whether Clark, knowing the keys had to be returned, felt compelled to voluntarily undertake the task. The Hofmeisters argued that this specific question is

irrelevant. The trial court seemed to agree, focusing instead on the facts that: (1) Dasher "indicated the keys had to be returned;" (2) return of the keys was for Dasher's benefit; (3) Dasher's dispatcher authorized the return of the keys; and (4) returning the keys was "incidental" to Clark's employment. The trial court noted and discounted the fact that Clark made two separate stops for coffee and fuel, stating those stops were "not evidence of any independent pursuit or deviation [but] merely in furtherance of Clark's primary mission[.]" The trial court did not address the facts that: (1) Clark was not on a direct route between his home and Dasher's offices when the accident occurred; (2) Clark did not recall why he deviated from the direct route to Dasher's offices; (3) Clark himself had created the circumstances necessitating a return of the keys and credit card; or (4) when asked in a pre-litigation interview whether he was on company or personal business, Clark himself responded, "[T]hat's debatable."

On October 3, 2002, rather than challenging the trial court's ruling, Dasher stipulated liability[10] and simultaneously presented the Hofmeisters with an offer of judgment, pursuant to CR 68, in the amount of $175,000.[11] Eight days later, on October

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[10] Murner testified this was a tactical decision "to refocus the issues to the damages, which is what we always wanted to address in this case." On cross-examination, Golden attempted unsuccessfully to have Murner admit the stipulation indicated CIC knew Dasher was liable all along "because nothing had changed in the case" from the date of Dasher's original offer, June 22, 2000, until liability was conceded.

[11] The Hofmeisters have argued throughout the litigation, and now in this appeal, that the net value of this $175,000-offer was

the offer increased to $300,000. On the day of trial, October 14, Dasher offered $500,000. Before trial started, Dasher offered the $1,000,000 limits of its policy of automobile liability insurance. On behalf of the Hofmeisters, Golden accepted, but conditioned that acceptance upon certain concessions from some of the other defendants.

Because this occurred on the day trial was to commence, and because terms of the settlement were unclear, the parties agreed to go on the record with the trial court, as "the way to consummate this settlement[,]" to use Golden's words. Golden and Murner were present on behalf of their respective clients.[12] Also present, either in person or by telephone conferencing, were representatives of Clark's personal insurer and the attorney for Farm

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$25,000 because of "liens" in favor of Travelers and Farm Bureau. There is nothing in the record supporting the existence of such liens.

[12] At this point in the litigation, Murner was representing Dasher and Clark. Before the trial court determined that Clark was acting within the scope of his employment with Dasher, Clark had separate counsel. He had never requested coverage from CIC. Once the scope-of-employment issue was decided, CIC provided Clark's defense. Still, on the heels of the jury verdict in the case *sub judice*, Clark filed a civil action over this issue claiming CIC violated the UCSPA. *Clark v. Cincinnati Ins. Co.*, No. 2005-CA-000356-MR 2006 WL 1044461 (Ky. App. April 21, 2006). This Court in *Clark* affirmed the Fayette Circuit Court's dismissal of Clark's claim. In an example of *litigation* making strange bedfellows, Clark's attorney was Dale Golden.

Bureau Insurance. As the case against CIC for statutory bad faith had been bifurcated and all such claims were to be addressed later, attorney Risley was not present on behalf of CIC.

Golden initiated the discussion by representing he could "blackboard over $20 million in damages and that will expose Eugene Clark to that excess judgment[.]" Only moments into the hearing, a reference was made to the "excess policy with Dasher of $10 million[.]" Murner corrected the speaker and clarified that Dasher's excess policy was only $5 million. Owing to telecommunications glitches, Murner had to repeat three times that the amount of Dasher's excess insurance coverage was $5 million.

Before the negotiations ended, eleven separate references were made to the existence of Dasher's policy of excess insurance. In addition, the excess insurer was identified as Fireman's Fund three separate times. And the excess policy limits of $5 million were stated a total of four times. Nothing in the transcript indicates that anyone, including Golden, was surprised by or unaware of the existence of Dasher's policy of excess insurance.

The sticking point in settlement, however, was the relatively smaller amount of $100,000. This is one of the sums of insurance Golden collected for the Hofmeisters before initiating litigation. Before the parties could reach a settlement, one question had to be resolved: which party or insurance company would ultimately be responsible for that amount? The attorneys for the Hofmeisters and Dasher and

Clark were attempting to convince the representatives of the insurance companies to waive the right to recover the sum from any of them.

Golden pointed out that he could easily prove more than $100,000 in damages and, if the trial went forward, the obstinacy of Clark's personal liability insurer "will expose Eugene Clark to that excess judgment." This prompted Clark's insurer to ask, "Isn't Mr. Clark an insured under the excess policy, also?" To this, Murner responded that he "had no authority from the excess carrier. A million dollars is what we're offering here." Golden proposed a simple solution: "[I]f [Clark's personal liability insurer] pays the hundred [thousand dollars] that it already committed to pay earlier, then we're all done and it's over with, we can all go home."

Clark's insurer balked. So, Golden announced he was prepared "to proceed against Eugene Clark, and if we ring him up, then we're going to take his personal assets . . . and our position is going to be that [Clark's personal liability insurer] has acted unreasonably and violated the Unfair Claims Settlement Practices Act[.]" Eventually, the representatives of the affected insurers agreed to brief and argue this particular issue among themselves, leaving the remaining parties out of that particular fray and free to settle their claims.

On the points of settlement, Murner was very clear that the settlement for the limits of Dasher's automobile liability policy embraced a universal release of liability relative to the underlying tort claim.

Mr. Murner: Okay, Your Honor, my position is—and if I'm wrong, somebody tell me now. Cincinnati, excess carrier, Dasher and Clark are protected, and free and clear from—

The Court: I don't know what anybody else thinks, but I am clear on that, for whatever it is worth.

. . . .

Mr. Murner: What I want to make sure is that this is a complete release. I mean, this is the standard complete release with the exception of [the remaining issues among the insurers regarding subrogation issues apart from the parties].

Mr. Golden: I agree.

In accordance with this agreement, Murner drafted a settlement agreement and release.[13] The

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[13] Golden actually made the first attempt at drafting the agreement. However, that draft was incomplete in that it did not include the release of CIC and Fireman's Fund as to the underlying tort claim and it left unresolved the subrogation dispute between the Hofmeisters' insurer and Clark's insurer.

Hofmeisters' right was reserved to continue pursuing the bad faith and UCSPA claims against CIC and Fireman's Fund. Otherwise, the Hofmeisters released Dasher, Clark, CIC and Fireman's Fund for all claims arising directly from the automobile accident only.

There was a delay in obtaining approval from the Hofmeisters' insurer and Clark's personal insurer relative to the subrogation issue. This delayed execution of settlement documents and disbursement of proceeds. Attempting to encourage movement on the issue, Golden filed a motion to enforce the settlement on behalf of the Hofmeisters, followed by a motion on his own behalf, based on his own lien, for immediate disbursement of his attorney fees and costs expended.

In his motions, Golden claimed that he never agreed to include CIC and Fireman's Fund in the release of the underlying tort action. Blaming Murner, Golden insisted that the trial court "stop the wrongful conduct of withholding the settlement proceeds in exchange for additional releases that were never bargained for[.]" Golden insisted the delay was to pressure the Hofmeisters into dismissing their bad faith claims.

On behalf of Dasher and Clark, Murner responded that he had

> never included a provision in any proposed settlement agreement providing for protection against allegations of violation of the Unfair

> Claims Settlement Practices Act [or] in any correspondence that any release must contain protection from any potential bad faith allegations[.] Thus, any claim by Plaintiffs' counsel that settlement proceeds are being withheld to solicit a release of bad faith claims on behalf of Cincinnati Insurance and/or Fireman's Fund Insurance Company are simply unsupported by the correspondence between counsel and the proposed settlement release.

Murner's position is easily verified by the language of the settlement agreement itself. Furthermore, nothing in the record contradicts Murner's position on this issue, nor does the record support Golden's suggestion otherwise.

Eventually, all of the issues were resolved by the attorneys without the need for the trial court to rule. However, the delay was long enough that it allowed Allied Capital Corporation, one of George Hofmeister's judgment creditors, to intervene in this action and garnish the settlement proceeds before the Hofmeisters received them.

In May 2003, the Hofmeisters sought leave to file another amended complaint. In essence, this amendment added two counts. First, the Hofmeisters alleged that CIC's rapid increase in offers between October 3 and October 14, 2002, from $175,000 to $1,000,000, violated Kentucky's UCSPA. Second, they alleged that CIC intentionally prolonged settlement to purposefully take advantage of the

Hofmeisters' worsening financial circumstances. The motion was granted and the amended complaint ordered filed on June 5, 2003.

In August 2003, ten months after the settlement negotiations were recorded before the trial court, it occurred to the Hofmeisters that they had an opportunity to file yet another amended complaint. Here, they alleged that CIC "misrepresented pertinent facts regarding the amount of insurance that was available" and "failed to disclose the existence of an excess insurance policy." The motion was granted and the amended complaint ordered filed on September 15, 2003.

In February 2004, the Hofmeisters sought leave to file what became their final amended complaint. Seemingly aware of this Court's nonfinal opinion in *Knotts v. Zurich Ins. Co.*, 2002-CA-001846 (Feb. 6, 2004) that no post-litigation conduct by an insurance company can be the basis of a UCSPA claim, the Hofmeisters' "Fifth Amended Complaint"[14] alleged that all of CIC's actions also supported a claim for common law fraud and intentional infliction of emotional distress. It appears from the record that this tactical decision was intended to avoid the potential that *Knotts*, once final, would totally defeat the Hofmeisters' claims under the UCSPA. The motion was granted and the amended complaint ordered filed on May 17, 2004, three days before trial.

[14] While this was the fifth amendment of the complaint after CIC was named as a defendant, it was the sixth time the original complaint was amended.

Before trial commenced on May 20, 2004, CIC moved for a continuance because the amended complaint had been filed so close in time to the commencement of trial. The motion was denied because there were no additional factual allegations, only additional legal theories. The trial judge also addressed numerous procedural and evidentiary motions, filed by both sides. Over CIC's objection, the trial court ruled that Murner was CIC's agent for purposes of settlement negotiation. *See, infra*, Section II.C.

Both sides tendered proposed jury instructions. The parties announced ready and the trial proceeded. At the close of evidence, each party moved for directed verdicts. As to the issues now before this Court, those motions were denied. The jury was instructed in preparation for its deliberations.

The trial court took the parties' respective proposed jury instructions into consideration but crafted its own. The court incorporated its previous holding that Murner was CIC's agent into Instruction No. 2, addressing violations of the UCSPA, and Instruction No. 3, addressing fraudulent misrepresentation. Therefore, the jury was entitled to attribute Murner's conduct to CIC for liability purposes. The jury received no instruction regarding fraud by omission, *i.e.*, the Hofmeisters' allegation that CIC failed to disclose the existence of the policy of excess insurance coverage. Further details of the jury instructions will be discussed as necessary in the context of the parties' various arguments. The case was turned over to the jury

which found for the Hofmeisters on both Instruction No. 2 and Instruction No. 3, though not unanimously on either.

CIC filed motions for judgment notwithstanding the verdict; for a new trial; and to alter, amend or vacate the judgment. To the extent the bases for these motions are relevant to this appeal, they will be discussed *infra*. It is sufficient now to note only that all post-judgment motions were denied with the exception of the motion to reduce the punitive damages award. These appeals followed.

II. *Cincinnati Insurance Company v. Hofmeister*, 2004-CA-002296

CIC presents a plethora of arguments on appeal. Many of these arguments center on one central question: What legal relationship exists between an insurer and legal counsel hired to defend its insured? Surprisingly, Kentucky has never addressed this question squarely, but the answer is crucial to resolution of this case. After addressing this question generally, we will apply the law to the facts of this case, and then address CIC's additional arguments *seriatim*.

We further preface our discussion by noting two factors that will distinguish this case from many others. First, the underlying litigation was a negligence action brought by a claimant seeking restitution from a tortfeasor. It was not a contract action brought either by the first-party insured, by a third-party beneficiary of an insurance contract, or a third party who stood in the shoes of the insured as a

result of an assignment. Second, the Hofmeisters made no attempt to settle the case with Dasher prior to the filing of the complaint. Consequently, whether the concepts discussed here have equal application to pre-litigation conduct will depend on circumstances not present in this case.

A. Standard of Review

Many of the issues addressed here were preserved in more ways than one. The issues which are dispositive of this case involve the denial of CIC's motions for directed verdict and for judgment notwithstanding the verdict. The same standard applies to both. *Prichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky.App. 1987). A directed verdict or judgment notwithstanding the verdict is appropriate when, drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict. *Buchholtz v. Dugan*, 977 S.W.2d 24, 26 (Ky.App. 1998); *see also, Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). A reviewing court may not disturb a trial court's decision on a motion for directed verdict unless that decision is clearly erroneous. *Bierman* at 18. The denial of a directed verdict by a trial court should only be reversed on appeal when it is shown that the verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice. *Id.* at 18-19.

B. Relationship of Attorney Defending Insured and Insurer – Generally

In Kentucky, the relationship of the insurer to the attorney hired to defend the insured has been discussed primarily in caselaw interpreting the Rules of Professional Conduct, Supreme Court Rule (SCR) 3.130. While the trial court was not inclined to consider these cases because Murner's professional responsibility was not directly in issue, we believe they are illuminating.

In *American Ins. Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996), the insurance industry sought permission for its insurer members to use in-house lawyers to defend their insureds, or at least to engage outside counsel on a "set fee" or retainer basis to handle all litigation. Both requests were denied.

Reaffirming the sanctity of the relationship between the insured and the attorney hired to defend him, our Supreme Court reemphasized that "[n]o man can serve two masters[.]" *American Ins. Ass'n* at 571, *quoting Kentucky State Fair Bd. v. Fowler*, 310 Ky. 607, 615, 221 S.W.2d 435, 439 (1949). It is axiomatic that a lawyer must serve his client dutifully and loyally. Building upon that axiom, the Supreme Court recognized that granting the industry's request would move the attorney closer to certain "inherent pitfalls and conflicts" that would interfere with his duty and loyalty to the client. *Id.* at 571.

> Inherent in all of these potential conflicts is the fear that the entity paying the attorney, the insurer, and not the one to whom the attorney is

> obligated to defend, the insured, is *controlling* the legal representation.

American Ins. Ass'n at 573 (emphasis supplied). To quell that "fear," "[w]e continue to adhere to the view that it would be contrary to public policy to allow the insurer to control the litigation[.]" *Wheeler v. Creekmore*, 469 S.W.2d 559, 563 (Ky. 1971).

American Ins. Ass'n was not the first time we rejected a "rule [that] would be inimical to the preservation of traditional and longstanding concepts associated with attorney-client relationship, as recognized by Kentucky law." *American Continental Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12, 13 (Ky.App. 1998) (rejecting excess insurer's claim of right to sue its insured's attorney for malpractice). Our courts simply cannot ignore Kentucky's consistent refusal to allow the insurer any right to control the attorney's independent manner of representing its insured. That independence has a long history.

In *New Independent Tobacco Warehouse, No. 3 v. Latham*, 282 S.W.2d 846 (Ky. 1955), our highest court said that the "general rule is the services of a professional man, such as a lawyer . . . are rendered under an independent contract[.]" *Id.* at 848. That is, a lawyer is one "who follows [his] employer's desires only as to results of work, and not as to means whereby it is to be accomplished." *Romero v. Administrative Office of Courts*, 157 S.W.3d 638, 642 (Ky. 2005), *quoting* BLACK'S LAW DICTIONARY 770 (6th ed.1990). These same rules apply when an insurer selects and pays an attorney to represent its

insured. The Tennessee Supreme Court accurately described the relationship:

> In the typical situation in which an insurer hires an attorney to defend an insured, the relationship of the insurer and its attorney is precisely that of principal to independent contractor. [T]he attorney is engaged in the distinct occupation of practicing law . . . one in which the attorney possesses special skill and expertise. [T]he attorney generally supplies his or her place of work and tools; the attorney is employed and paid only for the cases of individual insureds; and he or she alone, consistent with ethical obligations to ensure competence and diligence in the representation, determines the time to be devoted to each case. Finally, and obviously, the practice of law is not, nor could it be, part of the regular business of an insurer.

Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 393-94 (Tenn. 2002); *see also*, *Sam Horne Motor & Implement Co. v. Gregg*, 279 S.W.2d 755, 756-57 (Ky. 1955)(factors for determining independent contractor status); *see also*, *Vires v. Dawkins Log & Mill Co.*, 240 Ky. 550, 42 S.W.2d 721, 722 (Ky. 1931)("independent contractor is . . . independent of his employer in the execution of his work, and may labor at the times and in the manner he prefers.").

Clearly, the factor most critical to the attorney's retention of his status as an independent contractor, *vis-à-vis* the insurer, is the attorney's retention of control over the means by which he accomplishes the insurer's desired result – defense of its insured. *Home Ins. Co. v. Henderson Lodge, No. 732, Loyal Order of Moose*, 201 Ky. 522, 257 S.W. 422, 423 (Ky. 1923)("If [one] is merely subject to the control or direction of the [employer] as to the result to be obtained, he is [still] an independent contractor. If [one] is subject to the control of the employer as to the means, he is not an independent contractor.")(quotation marks and citation omitted). We conclude that the relationship of an attorney hired to defend an insured relative to the insurer that hired him, at least initially, is that of independent contractor.[15]

As a general rule, an employer is not liable for the torts of an independent contractor in the performance of his job. *Miles Farm Supply v. Ellis*, 878 S.W.2d 803, 804 (Ky.App. 1994). While general rules often have philosophical or logical origins, their

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[15] This same conclusion has been reached by many of our sister states. *See, Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 788 N.E 2d 522, 539-41 (Mass. 2003)(Where lawyer "controls the strategy, conduct, and daily details of the defense . . . an insurer cannot be vicariously liable for the lawyer's negligence."), *and cases cited therein, and, Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co.*, 963 F.Supp. 452, 454 55 (M.D.Pa. 1997)("The attorney's ethical obligations to his or her client, the insured, prevent the insurer from exercising the degree of control necessary to justify the imposition of vicarious liability"), *and cases cited therein.*

exceptions typically are born of practical realities. Therefore, we cannot ignore the practical reality that an insurer may seek to exercise actual control of an attorney's work, even though lacking the right to do so. Our common law embraces that possibility.

Long ago, Kentucky recognized that if a principal lacking the right of control nevertheless "personally interferes with, undertakes to do, manage or control the work of the independent contractor, he thereby destroys the relationship of independent contractor." *Madisonville, H. & E.R. Co. v. Owen*, 147 Ky. 1, 143 S.W. 421, 424 (Ky. 1912). The independent contractor would thus convert to an employee or agent. Our review of authority reveals that Kentucky independent contractors, once possessed of the right to control their own work, are not inclined to relinquish that right to the employer. In fact, we failed to discover any case in which that has occurred.[16]

However low the rate at which typical independent contractors relinquish the *right* to control their own work, logic compels the conclusion that the rate would be even lower when that right is coupled with a *duty*. Unlike other independent

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[16] Several cases, notably *United Engineers & Constructors, Inc. v. Branham*, 550 S.W.2d 540 (Ky. 1977), reaffirm the longstanding rule that "the main dispositive criterion is whether it is understood that the alleged principal or master has the *right* to control the details of the work." *Id.* at 543 (emphasis supplied). Here we are speaking of a different concept – the principal's exercise of control despite having no right to do so.

contractors, the attorney who relinquishes the right to control will perforce violate his duty under the Rules of Professional Conduct, Rule 1.8(f)(2), and "clearly subject himself to severe discipline." *Summit v. Mudd*, 679 S.W.2d 225, 226 (Ky. 1984). An attorney's maintenance and protection of his independent contractor status is thus additionally reinforced. We therefore agree with our sister court that "cases in which an insurer may be held liable under an agency theory will be rare indeed." *Givens* at 395.

We also believe *Givens* indicates the proper standard for determining whether the insurer has exercised actual control of the attorney despite lacking the right to do so. Such control must be invidious in that it "affect[s] the attorney's independent professional judgment . . . interfere[s] with the attorney's unqualified duty of loyalty to the insured, or . . . present[s] a reasonable possibility of advancing an interest that would differ from that of the insured." *Givens* at 695.

We now apply these criteria to the facts of this case.

C. Whether the Trial Court Erred in Failing to Direct a Verdict That Murner Was Not CIC's Agent

The trial court concluded that Murner was CIC's agent for purposes of settlement negotiations. CIC claims that ruling was error. We agree.

The trial court did not engage in the analysis indicated above, but instead applied the reciprocal analysis of whether Murner was CIC's agent. Whereas independent contractor status is shown by the *absence* of the principal's control over the work to be performed, agency is shown by its *presence*. Just as with the independent contractor analysis, "the right to control is considered the most critical element in determining whether an agency relationship exists." *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 50 (Ky. 2003)(citation and quotation marks omitted). Therefore, the trial court's analytical approach was effectively the same as ours.

During oral argument of the issue, the trial court stated, "[I]t's pretty clear to me that Mr. Murner was *controlled and guided* by Cincinnati Insurance Company in terms of settling this case." (Emphasis supplied). The trial court determined that CIC exercised sufficient control over Murner to make him CIC's agent based on the following three facts alone:

(1) "Murner was hired by Defendant [CIC] to represent Dasher;"

(2) "Murner was required to report to [CIC];" and

(3) CIC "would have to approve any settlement offers [recommended by Murner]."

Having examined the record and finding no additional facts that would reinforce this list, we conclude that CIC was entitled to a directed verdict that Murner was not CIC's agent.

Respectfully, we believe the learned trial judge erred by not considering closely enough just what caused these three facts to occur. The trial court concluded they occurred because an agency relationship existed between Murner and CIC. But the record reveals that none of these three facts was intended as a means by which CIC would exercise control over Murner as its agent. Instead, each fact relates directly to a specific duty created by the insurance contract between CIC and Dasher. The contract and these duties existed well before CIC engaged Murner as Dasher's legal counsel.

The insurance contract created specific reciprocal duties that CIC and Dasher were required to satisfy when certain claims of Dasher's liability were asserted. CIC's duty was to defend such claims and to satisfy the legitimate ones. These duties were conditioned upon Dasher's satisfaction of its own duty to cooperate with CIC "in the investigation, settlement or defense of the claim[.]" To be entitled to the benefits of its bargain with CIC, Dasher had to obtain CIC's approval of any settlement it expected CIC to pay. At the same time, however, the contract did not prohibit Dasher from paying a claim without CIC's approval and outside the contract – that is, by utilizing any other Dasher asset to settle the Hofmeisters' demands – but such a payment would

be, according to the insurance contract, "at the 'insured's' own cost."[17]

CIC performed its duty to defend Dasher by selecting and agreeing to pay Murner to serve as Dasher's legal counsel. Experience tells us that an insurer is better able than its insured to select legal counsel to represent that insured. *State Farm Mut. Auto. Ins. Co. v. Marcum*, 420 S.W.2d 113, 120 (Ky. 1967)(insurer is "a professional defender of law suits[.]"), *overruled on other grounds, Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493 (Ky. 1975). Our courts will not penalize a party because he prudently authorized his experienced insurer to select the right attorney to defend him. *Asbury v. Beerbower*, 589 S.W.2d 216, 217 (Ky. 1979)(An insured who "has paid an insurance company to exercise that choice for him . . . should not be penalized for his prudence in that respect."). We are not surprised that such prudence was exercised in

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[17] We should not forget that a contract of liability insurance is simply an asset from which a liability may be satisfied. *See, Hillman v. American Mut. Liability Ins. Co.*, 631 S.W.2d 848, 848 (Ky. 1982)(liability insurance policy was tortfeasor's "only asset[.]"). Accident victims assert claims against alleged tortfeasors, not directly against the tortfeasor's insurer. Nothing prevents a tortfeasor's satisfaction of a claim from his assets other than insurance. It is simply because use of an insurance asset has the least disruptive effect on the continued operation of a business that it is naturally the first asset a business considers when contemplating claims settlement. However, whether to actually utilize that asset first remains the option of the business. It is not the option of the accident victim or his attorney to demand that the claim be satisfied from a contract of insurance.

this case. When Dasher paid its premium, it purchased CIC's expertise in selecting an attorney and, when a claim was asserted, CIC performed. It simply makes no sense to conclude that CIC's performance of its duty to select Dasher's attorney also supports a finding that the attorney thereby became CIC's agent. Absent evidence that there was more to such selection and compensation than satisfaction of a duty to Dasher, we cannot conclude that this fact supports a finding that CIC controlled Murner.

The trial court and the Hofmeisters next place much reliance upon Murner's cooperation with CIC and the acknowledgment that he routinely obtained CIC's approval before offering settlement to the Hofmeisters. This reliance is misplaced.

As Dasher's agent, Murner had a duty to follow Dasher's instructions. If Murner's cooperation with CIC had been contrary to Dasher's instructions, that would support an argument for Murner's role as CIC's agent. But nothing in the record suggests such a thing occurred. Murner's cooperation with CIC was consistent with the duty he owed to his client, Dasher; it was consistent with Dasher's duty to CIC; it was consistent with Murner's relationship to CIC as an independent contractor. *See, Latham, supra*, 282 S.W.2d at 848 (Fact that employer and independent contractor engaged in "daily conferences merely represented the [employer's] right to see that the work was progressing . . . and does not militate against the idea Latham was an independent contractor.").

The same can be said for Murner's act of obtaining CIC's approval before settlement was offered. Murner was, again, simply carrying out the contractual duty his client owed CIC.

It is also clear that Murner was not functioning as CIC's claims adjuster. The respective roles of the insured's attorney and the insurer's claims adjuster are entirely distinguishable. The adjuster's fundamental role is to settle the claim *apart from* litigation; the attorney's is to effectively conduct a defense in the litigation. The adjuster owes no independent loyalty to the insured apart from that owed by the insurer. The attorney's loyalty to his insured client is paramount. And, unlike the attorney whose conduct is controlled by his oath, the adjuster receives direction and authority from the insurer, which is why he has been deemed the insurer's agent. *Fidelity & Guaranty Ins. Underwriters, Inc. v. Gregory*, 387 S.W.2d 287, 289 (Ky. 1965). Furthermore,

> the adjuster and the claimant usually deal directly with one another. If their negotiations fail, the adjuster negotiates with plaintiff's counsel, and even after litigation is begun, the adjuster frequently deals directly with plaintiff's counsel.

Gailor v. Alsabi, 990 S.W.2d 597, 608 (Ky. 1999)(Lambert, C.J., dissenting).

Our conclusion that CIC did not control Murner is also strengthened by the undeniable fact

that Murner and Dasher enjoyed an attorney-client relationship. When Murner undertook Dasher's legal representation, he became Dasher's agent, not CIC's. *Douthitt v. Guardian Life Ins. Co. of America*, 235 Ky. 328, 31 S.W.2d 377, 379 (1930)("an attorney is an agent of his client"). Kentucky has always jealously guarded the attorney-client relationship, for while "[t]he relationship is generally that of principal and agent . . . the attorney [owes his client] a higher duty than any ordinary agent owes his principal." *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky.App. 1978). As described *supra*, Murner's relinquishment of control to CIC would have required that he abdicate his professional responsibility, abandon his true principal, and jeopardize his career.

We conclude that where there is no evidence other than the fulfillment of those duties existing between the lawyer and the insured as his client, and the fulfillment of those duties existing between the insured and the insurer, there can be no finding of an agency relationship between the insurer and the attorney it hires to defend its insured. These duties exist and will be carried out in every case of this nature. If we held that these facts alone would support a finding that the insurer controlled the attorney, not only would we have to conclude that the attorney is *always* the insurer's agent, we would be inviting, if not requiring, the very conflicts our caselaw and ethical rules seek to avoid. *See, e.g., American Ins. Ass'n, supra*; Kentucky Rules of Professional Conduct, (SCR) 3.130(1.7) and (1.8).

For their part, the Hofmeisters assert that additional evidence does exist. They claim Murner became directly involved in deciding whether CIC's policy covered his client's employee. Examination of the record does not support more than their attorney's argument to that effect, and the unrefuted evidence of record contradicts the assertion. In his testimony, Murner made the point, and we believe correctly, that the scope-of-employment issue (critical to his client's common law liability to Hofmeister) and the coverage issue (critical to CIC's contractual liability to Clark as a third-party beneficiary) were independent considerations, and that his focus was on the former. Murner's opinion regarding scope of employment may have affected CIC's decisions regarding coverage, but that alone will not support an agency relationship between CIC and Murner.

The Hofmeisters also believe that CIC should be judicially stopped from denying the agency relationship because of a prior assertion in this same proceeding that CIC's communications with Murner were privileged. We disagree. "The judicial estoppel doctrine . . . prevent[s] a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party *in a prior proceeding*." *Colston Investment Co. v. Home Supply Co.*, 74 S.W.3d 759, 763 (Ky.App. 2001)(emphasis supplied). Even if we were to expand the doctrine to include inconsistent positions within the same proceeding, we certainly could not do so selectively. We would have to apply the doctrine equally to the Hofmeisters who sought to avoid the attorney-client privilege by arguing below that Murner was not CIC's attorney. To use the Hofmeisters' attorney's words, "As this

Court is well aware, an attorney can only represent the insured."

The Hofmeisters next argue that Murner had either actual or apparent authority to bind CIC in settlement negotiations. Though the brief makes virtually no reference to the record on this point, our examination does not disclose evidence to justify such a conclusion. Until the complaint was amended in mid-August 2001, there was no claim against CIC to be settled. After that point, attorney Risley was hired to represent CIC. We find it difficult to understand this argument under these circumstances. Evidence that Murner sought a release that would include CIC, and even evidence that Murner conveyed information to Golden that CIC would be responsible for negotiating Hofmeister's PIP settlement, is not inconsistent with Murner's independent contractor status *vis-à-vis* CIC.

However, the trial court, citing *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996), appears to have accepted this last argument. We believe that case is inapposite. The attorney with settlement authority at the center of *Clark* represented the tort claimant. *Id.* at 575. The only other attorney involved represented the joint tortfeasors and not either of their insurers. *Id.* In fact, no insurer is mentioned at all. *Clark* simply stands for the proposition that, under proper circumstances, an attorney can bind his client. CIC was not Murner's client. Excluding a sort of circular argument, we simply cannot see how *Clark* supports the finding the CIC exercised the

kind of control over Murner that would have made Murner its agent.

The Hofmeisters' argument that Murner could bind CIC in settlement reveals a fundamental confusion about the nature of the underlying claim. An automobile accident gives rise to a tort claim against the tortfeasor, but not any kind of claim against that tortfeasor's insurer (unless, of course, the claimant is also an insured under the same policy). The accident victim has no right, prior to obtaining a judgment against the tortfeasor, to assert a direct claim to insurance policy proceeds. *Central Mut. Ins. Co. v. Pippen*, 271 Ky. 280, 111 S.W.2d 425, 426 (Ky. 1937); *cf., Wheeler v. Creekmore*, 469 S.W.2d 559, 564 (Ky. 1971)(where one jurist lamented the fact that an insurance contract is not "viewed as one vesting in the injured third party a direct cause of action;" Osborne, J., concurring). Consequently, CIC had no liability in the underlying tort action that would have required negotiation or compromise. If there had been evidence that Murner had authority to bind CIC, it would have been, at best, merely incidental to his duty to defend Dasher.

The record is devoid of any evidence that CIC exercised any actual control, invidious or otherwise, over the means by which Murner accomplished his representation of Dasher, including his efforts toward settlement of the tort claim. These settlement efforts are best characterized as an appropriate attempt by Dasher's attorney, utilizing a Dasher asset (the contract of insurance), in accordance with contract terms requiring Dasher's cooperation and

CIC's approval, to settle a tort claim against his client.[18]

We therefore agree with CIC that the trial court erred by denying its motion for directed verdict that Murner was not CIC's agent. Murner began and maintained his representation of Dasher as CIC's independent contractor. Consequently, the general rule prevails and CIC is not vicariously liable for any of Murner's actions undertaken in the performance of his representation of Dasher. *Miles Farm Supply v. Ellis*, 878 S.W.2d 803, 804 (Ky.App. 1994).

D. Whether the Trial Court Erred in Failing to Direct a Verdict in Favor of CIC on the Claim of Fraudulent Misrepresentation

CIC asserts the trial court erred by denying its motion for directed verdict on the Hofmeisters' claim of fraudulent misrepresentation. We agree.

Common law fraudulent misrepresentation requires proof of six elements: "(1) that the declarant made a material misrepresentation to the plaintiff,

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[18] In view of our holding, we need not rely on the alternative basis for reversal that the record is completely devoid of evidence sufficient to constitute the required mutual "manifestation of consent" that Murner serve as CIC's agent. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 50 (Ky. 2003). Without contradiction, Murner testified that he never consented to have either his litigation conduct or his settlement conduct controlled by CIC, and that his loyalty to his client was never compromised by any obedience to CIC inconsistent with his duty as Dasher's attorney.

(2) that this misrepresentation was false, (3) that the declarant knew it was false or made it recklessly, (4) that the declarant induced the plaintiff to act upon the misrepresentation, (5) that the plaintiff relied upon the misrepresentation, and (6) that the misrepresentation caused injury to the plaintiff." *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 262 (Ky.App. 2007). There must be clear and convincing proof of each of these elements. With regard to at least three of these elements, the proof was entirely lacking. Therefore, the trial court's denial of a directed verdict and judgment notwithstanding the verdict was clearly erroneous.

The trial court adopted the Hofmeisters' proposed fraud instruction language which misidentified the misrepresentation as "that there was only one (1) million dollars in insurance coverage[.]"[19] They claimed Murner made this statement as CIC's agent in his letter to Golden dated May 18, 2000. We have already determined that Murner was not an agent of CIC, but its independent contractor. Thus CIC is not vicariously

[19] There is a technical difference between the instruction's wording and the actual language the Hofmeisters alleged misled them – that their $1.5-million demand was "in excess of the policy limits provided by Dasher's insurance carrier[.]" The October 14, 2002, settlement conference is the first time the record reflects that either Murner or CIC represent that the limits of the policy CIC wrote for Dasher were $1,000,000. CIC proposed more generally that the instruction simply ask the jury to determine whether CIC had misrepresented "pertinent facts" regarding insurance coverage. Jury instructions identifying the alleged representation must portray it with accuracy.

liable for that statement. It is not debatable that no other CIC representative made such a statement. CIC cannot be the declarant of the alleged actionable representation. Therefore, no evidence supports the first element of fraudulent misrepresentation – that CIC made a material misrepresentation.

The Hofmeisters respond by arguing that even if Murner was an independent contractor, CIC can still be liable for fraudulent misrepresentation on its own account. Arguing for what might be termed reverse engineering of the tort, they urge us to conclude that the jury inferred fraudulent misrepresentation from CIC's breach of its duty to disclose that Dasher had another asset to satisfy their claim, *i.e.*, the excess policy. This presumes a duty to disclose. However, the duty to disclose describes an element of the different tort of fraudulent concealment requiring proof of "substantially different elements." *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky.App. 2003).

Disregarding, *arguendo*, that the jury was not instructed as to the tort of fraudulent concealment, and further *equating* fraudulent concealment with fraudulent representation, *cf., Bankers Bond Co. v. Cox*, 263 Ky. 481, 92 S.W.2d 790, 792 (1936)("such concealment was in fact a false representation"), we do not find merit in either of the Hofmeisters' arguments that CIC owed them such a duty.

The Hofmeisters quote *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145 (Ky. 2003), for the proposition that "when the principal is under a duty

to provide protection for . . . others and confides the performance of that duty to a servant . . . who causes harm to them by failing to perform that duty, vicarious liability attaches even if the agent or subagent is not a servant, *i.e.*, is an independent contractor" such as Murner. *Id.* at 151. We believe *Williams* is not helpful. While an accurate quote, this is not an accurate reflection of the holding.

In *Williams*, two students skipped school and were involved in an automobile accident resulting in the death of one student. The student's estate sought relief against the Kentucky Department of Education (DOE) claiming negligent supervision. The principal issue in *Williams* was DOE's defense

> that local boards of education are not agents of the DOE but are separate and distinct agencies of the Commonwealth assigned to perform separate and distinct functions, *i.e.*, they are co agents; and, thus, the DOE is not vicariously liable for the failures of employees of local boards[.]

Id. at 152. The principal holding in *Williams* was a rejection of that argument.

> From the language and structure of this statutory scheme, we conclude that the legislative intent was to vest the overall management, operation, and control of the common schools in the DOE, with the local boards of education *functioning as agents* of the DOE . . . . Thus viewed,

> the statutory relationship between the DOE and the local board was more *akin to that of principal-agent* than to that of co-agents.

Id. at 154 (emphasis supplied). The issues had nothing to do with independent contractors. The language upon which the Hofmeisters rely is mere *dicta*.

Furthermore, we believe the Hofmeisters misinterpret these *dicta*. They argue this language supports a holding that CIC owed a duty to "provide protection" to them by disclosing the existence of a potential source of recovery for a liability they had yet to establish. We believe no such duty exists. *Cf., National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752, 760-61 (6th Cir. 2007)(a slightly different concept; "no Kentucky court has recognized a duty" nor is there "any reason why the Kentucky Supreme Court would impose a duty on an insurance company [even] to investigate whether its insured has other insurance coverage."). Support for our view can be found by reading *Williams* more closely.

The *Williams* quote, referencing a duty to provide protection for others, is based on RESTATEMENT (SECOND) OF AGENCY § 251 (1958). Contrary to the Hofmeisters' suggestion, that section does not describe a manner in which vicarious liability may be *created* absent an agency relationship. As even the caption to § 251 illustrates, the kind of liability being described presumes the agency relationship *already exists*. RESTATEMENT (SECOND) OF AGENCY, *supra*, § 251 ("Liability For

Physical Harm *Caused By A[n] Agent*;" emphasis supplied).[20]

The Hofmeisters argue that there is an alternate source for CIC's duty. Citing *Smith v. General Motors Corp.*, 979 S.W.2d 127 (Ky.App. 1998), the Hofmeisters claim CIC's duty arose "from a *partial disclosure* of information, [or] from particular circumstances such as where one party to a contract has *superior knowledge* and is relied upon to disclose same." *Smith* at 129 (emphasis supplied). Neither argument has merit.

Taking the latter first, the "superior knowledge" argument requires that the "defrauder" and the "defraudee" be parties to the same contract. We should not have to point out that the Hofmeisters and CIC were not in privity.

The "partial disclosure" argument also fails. The Hofmeisters maintain that Murner's letter constitutes a disclosure about insurance coverage that, because it was only partially true, was a false representation of the *whole* truth. *See, Dennis v. Thomson*, 240 Ky. 727, 43 S.W.2d 18, 23 (1931). Therefore, goes their argument, CIC had a duty to supplement Murner's information with a disclosure

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[20] Generally, RESTATEMENT (SECOND) OF AGENCY § 251 describes the liability of a party who, once owing a non-delegable duty of protection to a third person, cannot avoid liability on agency law grounds for the injury to that third person resulting from the negligence of an agent, regardless of whether the agent is a servant or a non-servant.

of the excess policy. The problem with this argument, whether under a theory of fraudulent concealment or fraudulent misrepresentation, is that the Hofmeisters' reliance on the information conveyed must be reasonable.

The reliance element contained in Jury Instruction No. 3(f) carried with it the implicit requirement that the reliance be reasonable. *Harralson v. Monger*, 206 S.W.3d 336, 341 (Ky.2006)("[*B*]*lind* reliance . . . fails the fifth requirement of fraud – *reasonable* reliance upon the claimed fraudulent act."). (Emphasis supplied). Based on the record before us, the Hofmeisters' reliance on their own or their attorney's impression of Murner's letter was unreasonable for several reasons.

Murner testified that when he learned Dasher had an excess policy, he told Golden about it, not once but twice. Golden did not take the stand to refute Murner, nor did the Hofmeisters present any other evidence contradicting Murner's testimony. Even if the jury chose to disregard Murner's testimony entirely, we are left with the transcript of the settlement negotiations, conducted on October 14, 2002, and attended by Golden, showing that the excess policy was referenced one-and-a-half dozen times. These references occurred before the conditions Golden placed on settlement were met and, therefore, before the Hofmeisters were legally committed to accept Dasher's settlement offer. In fact, after October 14, 2002, substantial issues remained and the Hofmeisters had to move the trial court to decide one of the issues remaining between

the Hofmeisters' and Clark's insurers. The settlement agreement itself was not finalized until December 2002.

Most significantly, it is well established that "[i]f the truth or falsehood of the representation might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglected to do so, and he is remediless." *Bassett v. National Collegiate Athletic Ass'n.*, 428 F.Supp.2d 675, 684 (E.D.Ky. 2006), *quoting Mayo Arcade Corp. v. Bonded Floors Co.*, 240 Ky. 212, 41 S.W.2d 1104, 1109 (1931). The case cited most frequently in Kentucky for this point of law is one of our earliest. In *Moore v. Turbeville*, 2 Bibb 602, 5 Ky. 602, 1812 WL 644, 5 Am.Dec. 642 (Ky. 1812), our high court said:

> [W]here an ordinary attention would be sufficient to guard against imposition, the want of such attention is, to say the least, an inexcusable negligence. To one thus supinely inattentive to his own concerns, and improvidently and credulously confiding in the naked and interested assertions of another, the maxim "*vigilantibus non dormientibus jura subveniunt*," emphatically applies, and opposes an insuperable objection to his obtaining the aid of the law.

Moore, 5 Ky. at 604.

In the two and one-half years of substantial discovery that occurred in this case, the Hofmeisters

elected never to seek discovery of the extent of Dasher's insurance as authorized by CR 26.02(2). We believe use of CR 26.02(2) perfectly illustrates the kind of "ordinary vigilance and attention" expected by this rule of law. On May 22, 2000, the Hofmeisters' attorney was "a little surprised" by Murner's representation of insurance.[21] This uneasiness could have been eliminated if only the Hofmeisters had asked for insurance information when they prepared and served discovery requests nine days later on May 31, 2000.[22] Failing to exercise that ordinary diligence at any time throughout the litigation, the Hofmeisters can claim no more than that theirs was the kind of "blind reliance" deemed unsatisfactory in *Harralson, supra*.

In response, the Hofmeisters cite *Meyers v. Monroe*, 312 Ky. 110, 226 S.W.2d 782 (1950), for the proposition that CIC "cannot escape on the ground that the complaining party should not have trusted him[.]" *Id.* at 785. They fail to note that *Bankers Bond Co. v. Cox*, 263 Ky. 481, 92 S.W.2d 790 (1936), relied upon as authority in *Meyers*, applies this concept only "where the one claiming to be deceived is not shown to have at hand any reasonably available means of determining the truth of representations made to him[.]" *Id.* at 792. Clearly,

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[21] Mr. Hofmeister testified that he too was surprised and, in response to Golden's examination at trial said, "I asked you to ask them about that [excess coverage] because I was surprised that they didn't have more insurance."

[22] They ignored the same opportunity when they served discovery requests in September 2000 and May 2001.

the Hofmeisters do not fall in the category of claimants contemplated by *Meyers*. Proof of the fifth element of fraudulent misrepresentation – reasonable reliance – is therefore entirely lacking.

There is yet a third element of fraudulent misrepresentation that entirely lacks proof in this case. There is no evidence that Murner knew the statement to be false when made on May 18, 2000. The Hofmeisters offered no evidence at all to refute Murner's testimony that he did not know of the existence of the excess insurance until later.[23] The earliest documentary evidence of the excess policy is dated June 9, 2000. Therefore, no evidence supports the third element of fraudulent misrepresentation.

While CIC presents arguments regarding each of the six elements of fraudulent misrepresentation, our examination is sufficient to convince us that the Hofmeisters could not and did not establish that claim. The trial court erred by denying CIC's motion for a directed verdict on the Hofmeisters' claim of fraud.

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[23] The Hofmeisters argue in their brief that Murner admitted that he kept the excess carrier "in the loop the entire time." They suggest this statement means Murner knew of the excess policy from the time he was engaged as Dasher's attorney. But this general statement, made as it was in a general context (and, in fact, denied by the excess carrier), is entirely consistent with Murner's specific testimony on this specific question. The general statement certainly is not clear and convincing evidence that would convince a reasonable person that Murner's specific testimony was a fabrication.

E. Whether the Trial Court Erred in Failing to Direct a Verdict in Favor of CIC on the Claim of Violations of the UCSPA

The Hofmeisters alleged violations of several sections of the UCSPA. Although the jury was instructed on four of those sections, the allegations boil down to a claim that CIC did not promptly offer to pay the Hofmeisters what their claims were reasonably worth. *See, Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 454 (Ky. 1997).

This case exemplifies one of our Supreme Court's warnings about UCSPA claims – the fact "that the statute is not specifically designed to accommodate third party claims[24] . . . makes trial

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[24] In fact, KRS 304.12-230 was never intended by its creators to establish any private right of action at all. The statute "is an almost verbatim adoption of the 1971 version of the model act formulated by the National Association of Insurance Commissioners (NAIC)[.]" *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 96 (Ky. 2000). It was intended by its drafters only as regulatory measure to assist state insurance administrators. NAIC emphasized the "original intent" of this model act when it issued this warning to legislatures: "A jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This Act is inherently inconsistent with a private cause of action." NAIC Model Law, Regulations and Guidelines, Unfair Claims Settlement Practices Act, NAIC 900-1, Section 1. Purpose, Drafting Note (January 2008); *see also* NAIC 900-9 (January 2008), citing Proceedings of the NAIC, 1989 Proc. II 204. As a consequence, Kentucky is in that distinct minority of states that recognizes a private right of action for violations of the UCSPA. *See Hovet v. Allstate Ins. Co.*, 135 N.M. 397, 89 P.3d 69, 76-77 (2004)(allowing private right of action but requiring first that "there has been a judicial determination of the

nearly impossible and appellate review most difficult." *Glass* at 460 (Lambert, C.J., dissenting). However, we have some clear guidance in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993) – "the leading case on 'bad faith' in Kentucky." *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 99 (Ky. 2000). Applying *Wittmer*, we have no difficulty concluding that the trial court erred in failing to grant a directed verdict in favor of CIC.

Justice Leibson's opinion in *Wittmer* was "the culmination of the development of 'bad faith' liability in our jurisprudence." *Id.* Writing for a unanimous Court, "Justice Leibson gathered all of the bad faith liability theories under one roof and established a test applicable to all bad faith actions, whether brought by a first-party claimant or a third-party claimant, and whether premised upon common law theory or a statutory violation." *Id.* at 100.

> We start with the proposition that there is no such thing as a "technical violation" of the UCSPA, at least in the sense of establishing a private cause of action for tortuous misconduct justifying a claim of bad faith:
>
> > [A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (1) the insurer must be obligated to pay the

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insured's fault and the amount of damages awarded in the underlying negligence action.").

> claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.... [A]n insurer is ... entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts.

Wittmer at 890 (quotation marks and citation omitted).

As it is the centerpiece of CIC's argument, we focus on the second element – the lack of a reasonable legal or factual basis for denying the claim. Considering all of the evidence in a light most favorable to the Hofmeisters, we conclude that CIC did have a reasonable basis for denying the Hofmeisters' claims. Those claims could not go forward against Dasher without establishing that Dasher was vicariously liable for Clark's acknowledged negligence. Vicarious liability depended upon whether Clark was acting in the scope of his employment at the time of the accident. Despite the Hofmeisters' insistence otherwise, the answer to that question was not clear.

Until the Hofmeisters filed their complaint nearly a year after the accident, no one exhibited any conviction that Clark was acting in the scope of his employment with Dasher. He had completed his work and gone home. He was in his own vehicle, not

Dasher's. The Hofmeisters' entire focus was on Clark and *his* automobile liability insurer. Not even Clark was sure he was working for Dasher at the time of the accident. The record before us does not reflect that he ever filed a workers' compensation claim. And when the adjuster for Hofmeister's insurer asked Clark, "Were you working on the job at the time [of the accident] or were you just on personal business?" Clark responded, "That's uh . . . that's debatable."

After the Hofmeisters filed suit naming Dasher as a co-defendant, their attorney insisted Dasher's liability was clear and it was bad faith to deny it. However, it took two years before Dasher, Clark and the Hofmeisters each filed summary judgment motions asking the trial court to determine vicarious liability. Dasher's motion, and Dasher's opposition to the Hofmeisters' and Clark's separate motions, presented legal and factual argument that Clark was not acting in the scope of his employment.[25]

Although the trial court eventually concluded that Clark was acting within the scope of his employment, Clark never accounted for, nor did the trial court appear to consider, the fact that, in a geographic context, the accident occurred at a point

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[25] Dasher's filing of these pleadings is litigation conduct. Litigation conduct amounting to bad faith can be sanctioned by the trial court pursuant to the civil rules. See the discussion, *infra* at Section II.F.1., of *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006) distinguishing litigation conduct and settlement conduct.

that took Clark substantially away from the purported purpose for the trip – to return Dasher's keys.[26] In the language of the early common law, this is an example of a "frolic and detour." *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 776, 118 S.Ct. 2275, 2778, 141 L.Ed.2d 662 (1998)(referring to "the classic 'frolic and detour' for which an employer has no vicarious liability").

Accepting the trial court's determination that Clark left his home in pursuit of Dasher's business, the law is clear that to remain in the scope of employment, he must not have deviated from its pursuit. *Sharp v. Faulkner*, 292 Ky. 179, 166 S.W.2d 62, 63 (1942). But because Clark turned off that direct route and headed in the opposite direction, toward Georgetown where the accident occurred, there is a genuine question whether he was still on his employer's business at the time of the accident. In *Dennes v. Jefferson Meat Market*, 228 Ky. 164, 14 S.W.2d 408 (1929), our highest court considered such deviation in the context of the employee's use of his employer's vehicle. Where the employee is using his own vehicle, we believe *Dennes* must apply at least equally so.

> Where deviation from the course of his employment by the servant is slight and not unusual, the court may, as a matter of law, find that the servant was still

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[26] We set aside the substantial factual dispute whether Dasher "ordered" Clark to return the keys, or whether he did so voluntarily.

> executing his master's business. On the other hand, if the deviation is very marked and unusual the court may determine that the servant was not on the master's business at all but on his own. Cases falling between these extremes will be regarded as involving a question of fact for the determination of the jury.

Dennes at 409; *see also, Wyatt v. Hodson*, 210 Ky. 47, 275 S.W. 15, 16 (1925)(master not liable for employee's auto accident where employee deviated 4-1/2 blocks from direct route of master's business). As our high court said in *Wyatt*, this "is a case of going beyond the route required in the service of the master, and in doing this he was acting for himself and not in the course of his employment." *Id.*; *see also, Winslow v. Everson*, 221 Ky. 430, 298 S.W. 1084, 1085 (1927). As held in *Model Laundry v. Collins*, 241 Ky. 191, 43 S.W.2d 693 (1931), Clark's personal venture would not have terminated nor would his service for Dasher have resumed until he returned to the point of departure from the business route –Interstate 64 – a point he never reached. *Id.* at 693.

Because the underlying accident case was settled, the trial court's decision regarding scope of employment was never challenged. However, whether the trial judge was correct is not the issue – the issue is whether Dasher's defense was "debatable on the law or the facts." *Wittmer* at 890. We are satisfied that the "defense was not only fairly debatable, it had substantial merit." *Bentley v.*

Bentley, 172 S.W.3d 375, 378 (Ky. 2005)(citation omitted). Since we conclude Dasher's defense was fairly debatable, we must also conclude that CIC's denial of the Hofmeisters' claim was reasonable. Therefore, under *Wittmer's* second element, there can be no UCSPA violation.

With regard to allegations that four individual sections of the UCSPA were violated, CIC specifically argues that the trial court should not have let the case go to the jury. We agree that the trial court turned the case over to the jury for resolution of an issue that was uniquely the trial court's alone to make.

Whether a tort has occurred under KRS 304.12-230 is precisely what *Wittmer* requires the trial court, not the jury, to decide. The "threshold problem" is to determine "whether the dispute is merely contractual or whether there are tortious elements justifying an award of punitive damages[.]" *Wittmer* at 890. To do that, the trial court *must* weigh in on the question of punitive damages by answering "whether the proof is sufficient for the jury to conclude that there was conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* (internal quotation marks omitted). The order denying the Hofmeisters' summary judgment motion shows the trial court did not make such a finding.

The Hofmeisters specifically sought the trial court's determination that CIC had violated four sections of KRS 304.12-230. The court declined

> to find that the conduct of Defendant [CIC] was "outrageous because of the defendant's evil motive or his reckless indifference to the rights of others." Wittmer v. Jones, 864 S.W.2d 885, 890 (1993). Such a determination of evil intent or indifference . . . is within the province of the jury, but not within the province of this Court on a motion for summary judgment.

Trial Court's Opinion and Order, May 17, 2004.[27] The trial court's mistaken belief that this question was for the jury does not take away from the fact that, when presented with the question, it declined to find evidence of tortious conduct, outrageous behavior, evil motive or reckless indifference to the Hofmeisters' rights. Considering the threshold, this is not surprising.

> The evidentiary threshold is high indeed. Evidence must demonstrate that an insurer has engaged in outrageous conduct toward its insured. Furthermore, the conduct must be driven by evil motives or by an

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[27] However, in its Opinion and Order denying CIC's post-trial motions, the trial court stated that "regarding the claim of statutory bad faith there was sufficient evidence of bad faith to present the question of punitive damages to the jury." Opinion and Order, October 25, 2004, p.6. Much of that evidence, however, was of litigation conduct admitted over CIC's objection and contrary to the subsequent holding in *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 522 (Ky. 2006).

> indifference to its insureds' rights. Absent such evidence of egregious behavior, the tort claim predicated on bad faith may not proceed to a jury.

United Services Auto. Ass'n v. Bult, 183 S.W.3d 181, 186 (Ky.App. 2003). While *Bult* is a first-party case, there is no justification for lowering the standard for third-party claims deriving as they must from the first-party's contract of insurance. Our Supreme Court has long embraced this approach in both first-party and third-party claims under the common law where it was recognized that bad faith determinations present "*troublesome, or even impossible, question[s] for the jury* [which] is just not equipped to evaluate [t]he issue of 'bad faith'[.]" *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 499-500 (Ky. 1976)(emphasis in original). We believe *Wittmer* simply extended to tort actions under KRS 304.12-230 the same requirement still existing under the common law that "[t]he issue of 'bad faith' should be decided by the trial court." *Id.* at 500; *see, Ruby Lumber Co. v. K.V. Johnson Co.*, 299 Ky. 811, 187 S.W.2d 449 (1945)("until repealed or altered by the Legislature . . . [w]e are not at liberty to ignore the common law totally [and] the intention to abrogate the common law is not presumed.").

A review of the evidence presented reveals a complete absence of the type of conduct required to clear the evidentiary threshold to send this case to a jury on a claim that CIC violated the UCSPA. The trial court's May 17, 2004, Opinion and Order implicitly supports this conclusion.

Our opinion is not changed, but bolstered, by our examination of the individual sections of the UCSPA upon which the jury was instructed – KRS 304.12-230(1), (6), (13), and (14).

Section (1) prohibits an insurer from "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue." All previous discussion regarding the Hofmeisters' claim of fraudulent misrepresentation applies as well to this claim. In addition, this section addresses "coverages" – a term used through the Insurance Code, KRS Chapter 304. Though not defined by statute or Kentucky caselaw, "coverages" is a term that identifies "the amount and extent of risk *contractually* assumed by an insurer." *Illinois Farmers Ins. Co. v. Tabor*, 642 N.E.2d 159, 163 (Ill.App.1994), *citing* BLACK'S LAW DICTIONARY 365 (6th ed. 1990)(emphasis supplied). It is an abbreviated means by which we define what the insured has contracted for in exchange for his premium. "Coverages at issue" therefore refers to an insured's[28] contractual dispute with his insurer, and not an accident victim's tort dispute with the

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[28] Of course, for purposes of defining the class of persons protected by the KRS 304.12-230(1), this would include both first-party insureds and third-party claimants to whom the insured assigned (as under common law) his claim against the insurer. A close reading of *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1988) indicates that, consistent with common law bad faith, Reeder was an assignee of the insureds' (the Hamptons') contractual rights. This is the only explanation for the Supreme Court's statement that the case involved "a *contractual* dispute over the amount of damages[.]" *Id.* at 118 (emphasis supplied). Unless the Hamptons assigned

insured-tortfeasor, or an accident victim's dispute with the insurer (unless as the assignee of the insured's rights under the contract he stood in the insured's shoes).

Under section (6), an insurer violates the UCSPA by "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]" At least with regard to third-party claims, we believe the *Wittmer* standards encompass this provision. As we just described, *supra*, the requirement that liability be reasonably clear was not met. Furthermore, we have yet to mention Golden's unreasonable demand that Dasher, and CIC, should need nothing more as proof of Mr. Hofmeister's $5,000,000-loss than his partially self-determined tax returns. Again, we turn to *Wittmer*, with some modifications applicable to this case.

> Although an insurer is under a duty to promptly investigate and pay claims where it has no reasonable grounds to resist in good faith, neither this duty nor any provision of the UCSPA requires the insurer to assume responsibility to investigate the amount of the claimant's loss for the claimant. The insurer'[s] legal responsibility is limited to payment upon proof of loss. The only proofs presented to [CIC] were

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their contractual rights to Reeder, Reeder could have had no contractual right at all *vis-à-vis* the insurer.

> the [largely] unsubstantiated amounts stated in the demand letter from [Hofmeister's] counsel. This letter provided neither supporting documents nor reference to reliable sources.

Wittmer at 891-92. Under these circumstances, the June 22, 2000, settlement offer can only be rationally viewed as a good faith offer. Despite a reasonable belief that Dasher may have no liability whatsoever, CIC authorized Dasher's use of the equivalent of $259,000 of its $1,000,000-policy to settle all but the lost income portion of the Hofmeisters' demands. That offer was rejected. Most significantly, the Hofmeisters withdrew their $1,000,000-offer, never to present it again. Instead, they chose to litigate, making no further settlement demands.[29] We cannot find in the record any evidence that would have justified the trial court in allowing the jury to consider whether CIC violated KRS 304.12-230(6).

Section (13) of the UCSPA allows a private right of action against an insurer for "[f]ailing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage[.]" Again, liability was not clear. Even if it had been, the Hofmeisters' claims were not claims under multiple portions of Dasher's insurance

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[29] The Hofmeisters' February 2001 attempt to accept a portion of Dasher's earlier offer (which they had rejected) was not a demand for settlement.

policy; they all arose under the same portion – Section II, Liability Coverage. Like KRS 304.12-230(1), the class of persons protected by this section are first-party insureds and third-party assignees of the first-party's rights.

Section (14) makes an insurer liable for "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement[.]" This is clearly another coverage issue that plainly refers to first-party claims. Still, logic requires that it fail for additional reasons. The Hofmeisters' underlying tort claim was not against CIC but against Dasher. The bases for denial of that tort claim for vicarious liability were fully set out in Dasher's answer and discovery responses. Any duty we can possibly read into section (14) would have required CIC to simply repeat Dasher's defenses. The law will not require such a useless exercise. *Blackerby v. Monarch Equipment*, 259 S.W.2d 683, 686 (Ky. 1953). But if somehow we concluded CIC did breach this section, we fail to see how the breach could cause any injury. It would be a mere "technical violation" for which no relief will be granted. *Wittmer* at 890.

For all of the foregoing reasons, we believe the trial court committed reversible error when it failed to direct a verdict in favor of CIC on the claims that it violated the UCSPA.

F. CIC's Remaining Arguments for Reversing the Verdict and Judgment

Consideration of the remaining claims of error is not necessary to determine CIC's liability. However, to understand the role of passion or prejudice in this jury's verdict, additional consideration is appropriate.

In particular, our consideration of three of CIC's arguments reveals aspects of that role. First, the trial court's denial of CIC's motion to exclude evidence of litigation conduct resulted in the jury's consideration of evidence deemed inadmissible both by *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006), and the Court of Appeals opinion it reversed. Second, the conduct of the Hofmeisters' attorney was considered "improper" by the trial court, but not so improper as to justify a new trial. That conduct, however, appears calculated to, and we believe did, have the effect of arousing the passion or prejudice of the jury. Third, while proof of the Hofmeisters' substantial reversal of economic fortune is undeniable, our examination of the record reveals nothing more than bold speculation that the reversal of fortune was caused by CIC's conduct.

We neither presume in any particular case, nor deny the proposition in general, that there is "a prejudice which juries frequently apply against insurance companies. Our courts have long been aware of this prejudice, as exemplified by our decisions in personal injury cases where the element of insurance has been improperly injected." *Aetna Freight Lines, Inc. v. R. C. Tway Co.*, 298 S.W.2d 293, 296 (Ky. 1957). We cannot quantify such prejudice in any case. But, in any degree, such an atmosphere combined with the other factors present

in this case is entirely conducive to the creation of a "perfect storm" – a verdict and judgment so palpably and flagrantly against the evidence as to indicate it was the product of passion or prejudice.

1. Whether Litigation Conduct Is Actionable Under the UCSPA

Following the Supreme Court's rendition of *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006), both parties supplemented their briefs with additional authority.[30] *Knotts* reversed the Court of Appeals opinion in *Knotts v. Zurich Ins. Co.*, 2002-CA-001846 (Feb. 6, 2004), that no post-litigation conduct by an insurance company can be the basis of a UCSPA claim. However, in reversing the Court of Appeals, the Supreme Court reopened the door only in the slightest degree. Litigation conduct was held inadmissible by both courts.

The Supreme Court identified "a distinguishing factor between the insurer's settlement behavior during litigation and its other litigation conduct." *Id.* at 523.

> We are confident that the remedies provided by the Rules of Civil Procedure for any wrongdoing that may occur within the context of the litigation itself

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[30] CIC referred us to *Knotts* while the Hofmeisters cited a case interpreting *Knotts*, *Hamilton Mut. Ins. Co. of Cincinnati v. Buttery*, 220 S.W.3d 287 (Ky.App. 2007).

> render unnecessary the introduction of evidence of litigation conduct.

Id. at 522. Attorneys, and even parties,

> are subject to direct sanction under the Civil Rules for any improper conduct. Though it goes without saying, we also note that those attorneys have significant duties under the Rules of Professional Responsibility, which allow for further sanctions for unethical behavior. Thus, we think the better approach is an absolute prohibition on the introduction of such evidence in actions brought under KRS 304.12-230.

Id. This has been referred to as "*Knotts's* . . . litmus test for inadmissible litigation conduct[.]" *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 535 (6th Cir.2006)("bad litigation conduct that the Rules of Civil Procedure adequately remedy [is] inadmissible to prove bad faith.")(applying Kentucky law).

The trial court below did not have the benefit of *Knotts's* specific analysis but did have CIC's general argument and objection substantially to the same effect. Nevertheless, over CIC's objection, Golden was permitted to admit evidence and to argue the propriety of litigation tactics, including but not limited to: the timing and sequence of discovery; whether it was proper to file a third-party complaint against Clark before taking his deposition; the assertion of subrogation and indemnification rights; the decision not to file a declaration of rights action

to determine whether the insurance policy covered Clark; and whether Murner should have subpoenaed documents from the Hofmeisters rather than using other more traditional means of obtaining information from adverse parties.

In *Knotts*, the Supreme Court considered it calamity to "permit the jury to pass judgment on the defense counsel's trial tactics and to premise a finding of bad faith on counsel's conduct" stating that it "places an unfair burden on the insurer's counsel, potentially inhibiting the defense of the insurer." *Id.* at 523. In fact, "given the chilling effect that allowing introduction of evidence of litigation conduct would have on the exercise of an insurance company's legitimate litigation rights, any exception threatens to turn our adversarial system on its head." *Id.* at 522. *Knotts* expresses the fear that a jury, "with the assistance of hindsight, and without the assistance of insight into litigation techniques, could second guess the defendant's rationales for taking a particular course." *Id.* at 520-21. The case before us represents the coming to fruition of that fear.

2. Whether Conduct of Hofmeisters' Counsel Required a New Trial

CIC moved the trial court for a new trial based on the misconduct of the Hofmeisters' counsel. *See*, CR 59.01(d). The trial court "agree[d] that Plaintiffs' attorney engaged in some improper behavior" but held that its admonition of both attorney and jury was sufficient to cure the impropriety.

Because Golden was a witness to much of CIC's alleged actionable conduct, his role as advocate was complicated, albeit by his own choosing. Often when Golden was cross-examining Murner regarding oral communications to which only they were privy, the challenging tone of the question itself bore the implicit counter-testimony to Murner's response. Golden's interrogation of Murner regarding his first disclosure of the excess coverage is an example.

> Golden: [T]he first time the excess carrier was brought up was back there when Melissa Wilson was on the phone [at the October 14, 2002, transcribed settlement conference] isn't that true?
>
> Murner: No, sir.

Of course, only Murner's answer is admissible evidence, but without taking the witness stand, Golden effectively represented to the jury that he knew nothing of the excess policy until that moment.[31]

---

[31] There are several instances of Golden stating a fact in his question of Murner for which Golden presented no evidence, each of which Murner denied: "Mr. Risley . . . talked about me withdrawing our demand for a million. I reinstated that demand right after that;" "I could have gotten a hundred million dollar verdict against those two young men [Dasher's principals];" "[Y]ou and I went back to that jury room right there, you said you were going to pay a million and I accepted;" and "[I] never agreed to release Fireman's Fund."

We need not question the trial court's ruling on Golden's conduct. However, we cannot escape the belief that the jury's verdict was affected by the cumulative effect of his "improper behavior."

3. Whether the Hofmeisters Proved Any Economic Loss Was Caused by CIC

CIC's argument that there was no proof of a causal connection between its conduct and the Hofmeisters' economic woes is based on *Roadway Exp., Inc. v. Don Stohlman & Associates, Inc.*, 436 S.W.2d 63 (Ky. 1968).

> The test of whether there can be a recovery for loss of anticipated revenues or profits is . . . whether the cause of the damage or injury can with reasonable certainty be attributed to the breach of duty or wrongful act of the defendant. . . . But no recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made or from other sources.

Id. at 65.

The Hofmeisters claim the causal connection is obvious and readily revealed in their theory of damages. Their theory is as follows:

(1) CIC misrepresented that Dasher had only $1,000,000 in insurance coverage;

(2) In fact, the CIC and Fireman's Fund policies combined for a total of $6,000,000 in coverage;

(3) If both insurers had tendered policy limits in June 2000, the Hofmeisters would have netted $4,000,000 after attorney fees;

(4) Mr. Hofmeister testified that if he had received a net $4,000,000 in June 2000, "it would have made a huge difference" that would have allowed him "to work out plans with different companies . . . to go out and buy a whole series of those bonds because they were trading on the open market at a huge discount" and he could have made "[r]oughly a hundred million dollars."

The Hofmeisters, not having their own expert, claim CIC's economic expert, James O. King, Jr., supported this theory and the testimony. Our examination of the actual exchange between Golden and Mr. King makes us dubious.

Golden: And you can't tell this jury, Mr. King, that if George Hofmeister was paid $4

million in cash in June of 2000, that it wouldn't have made a difference.

King: $4 million. I mean, I don't know, that's a sizeable amount of money and it might have enabled someone to keep a business going for a while, I don't know.

Golden: All right, the fact is you don't know, do you?

King: No.

In the final analysis, the theory is both factually and logically flawed.

The Hofmeisters never demanded $6,000,000 (or even the net figure of $4,000,000) in June 2000 or at any time.[32] To suggest they were entitled to have

---

[32] Though it went without objection, Golden's question to King impermissibly assumed this fact was in evidence. Our Supreme Court held that "a connection must be established between the cross-examination proposed to be undertaken and the facts in evidence. A [party] is not at liberty to present unsupported theories in the guise of cross-examination and invite the jury to speculate as to some cause other than one supported by the evidence." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997)(in a criminal context but citing Kentucky Rule of Evidence 403).

CIC and Fireman's Fund write checks to the Hofmeisters totaling $6,000,000 based on Golden's unsubstantiated demand of only $1,500,000 is both factually unsupported and completely illogical.

Mr. Hofmeister's testimony that he could have turned $4,000,000 in "stake" money into $100,000,000 is the unadulterated epitome of speculation. Furthermore, there is reason to question the veracity of that testimony as the record shows Hofmeister borrowed $6,000,000 in January 2000 from a friend and business associate, Richard Burkhart, and Hofmeister's businesses still failed.

Nothing more than speculation supports the allegation that CIC's conduct caused the Hofmeisters' economic losses.

Our Supreme Court has recognized that some attorneys exhibit a "personal bias against insurance companies and in favor of using bad faith and UCSPA allegations to extort payment of underlying claims from insurers." *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 447 (Ky. 1997). The manner in which Mr. Golden zealously represented the Hofmeisters would not exclude him from this class of attorneys. Regardless, we have identified sufficient factors to convince us that the jury's verdict was the product either of passion or prejudice or a combination of both. For the several reasons set forth above, the judgment against CIC must be reversed.

III. ***Hofmeister v. Cincinnati Insurance Company,*** **No. 2004-CA-002362-MR**

The Hofmeisters' appeal challenges only the trial court's reduction of the punitive damages award from $18,405,500 to $10,000,000. In view of our decision that CIC was entitled to directed verdicts on the fraudulent misrepresentation claim and the claim of violation of the UCSPA, Appeal Number 2004-CA-002362-MR must be dismissed as moot.

IV. Conclusion

Considering the law as applied to the undisputed facts, we must conclude that the Scott Circuit Court's denial of Cincinnati Insurance Company's motions for directed verdict and for judgment notwithstanding the verdict as to the claim of fraudulent misrepresentation and as to the claim that it violated KRS 304.12-230 was clearly erroneous. For the foregoing reasons, the judgment of the Scott Circuit Court in Appeal Number 2004-CA-002296-MR is reversed.

KNOPF, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

ORAL ARGUMENT AND BRIEFS
FOR APPELLANT AND CROSS-APPELLEE:

John T. Ballantine
Louisville, Kentucky

Ronald L. Green
Lexington, Kentucky

BRIEFS FOR APPELLANT AND
CROSS-APPELLEE:

Michael D. Risley
Louisville, Kentucky

ORAL ARGUMENT AND BRIEFS
FOR APPELLEES AND CROSS-APPELLANTS:

J. Dale Golden
Lexington, Kentucky

AMICUS CURIAE BRIEF FOR THE
KENTUCKY DEFENSE COUNSEL:

Gregg E. Thornton
Luke A. Wingfield
Lexington, Kentucky

APPENDIX B

SUPREME COURT OF KENTUCKY
2008-SC-0828-D
(2004-CA-2296 & 2004-CA-2362)

GEORGE HOFMEISTER, ET AL. MOVANTS

SCOTT CIRCUIT COURT
V. 2000-CI-0030

CINCINNATI INSURANCE
COMPANY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

Scott, J., would grant discretionary review.

ENTERED: May 13, 2009.

/s/ John D. Minton, Jr.
CHIEF JUSTICE

APPENDIX C

COMMONWEALTH OF KENTUCKY
SCOTT CIRCUIT COURT
CIVIL BRANCH
SECOND DIVISION
CASE NO. 00-CI-00030

GEORGE HOFMEISTER
And KAY HOFMEISTER, His Wife PLAINTIFFS

VS. **JUDGMENT**

CINCINNATI INSURANCE
COMPANY DEFENDANT

*** *** *** *** ***

On May 20, 2004, a jury trial began in the above-styled action. The Court called the case for trial whereon the Plaintiffs and Defendant announced ready. The following jurors were selected and sworn to try the issues of the case:

Angela M. Ewing	Gary Cullom
Anthony Brooks	Nancy Riley
Eva "Charlene" Lucas	Beverly Wallace
Deborah Demarest	Christopher Patrick
Karl Schreiber	Daniel Smith
Lisa Perkins	Lester Brewer
Michael Marcum	Ronald Scott

The Plaintiffs and the Defendant gave opening statements, followed by Plaintiffs calling witnesses

and producing evidence on their case-in-chief. After announcing close, the Defendant and the Plaintiffs moved for a directed verdict. The Court sustained the Defendant's Motion for Directed Verdict regarding claims of outrage and mental anguish by George Hofmeister. All other motions made by the Defendant and by the Plaintiffs for directed verdict were overruled. The Defendant then called witnesses and presented its case-in-chief. After the Defendant announced close, the Defendant and the Plaintiffs made motions for directed verdict which were overruled by the Court.

The Court then selected at random alternate jurors, Michael Marcum and Ronald Scott, who were then dismissed from further juror duties by the Court. The Plaintiffs and Defendant then gave closing arguments and the Court instructed the jury on the law of the case. The remaining jury members retired, deliberated, and returned the eleven-page verdict that is attached in its entirety as Exhibit A.

Based on the jury's findings regarding liability and damages:

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Plaintiffs shall recover from the Defendant, Cincinnati Insurance Company, the total amount of $28,405,500.00, plus recoverable court costs.

2. Interest shall accrue on this judgment entered against Cincinnati Insurance

Company in the total amount of twelve percent (12%) compounded annually until paid in full.

3. The Court will consider claims for attorneys' fees and interest that may be made by the Plaintiffs, along with any other post-judgment motions that are filed in this action.

This is a final and appealable order and there is no just cause for delay.

SO ORDERED this the 1st day of June 2004.

/s/ Paul F. Isaacs
JUDGE, SCOTT CIRCUIT COURT

PREPARED BY:

GOLDEN & WALTERS, PLLC

/s/ J. Dale Golden
J. Dale Golden
Corporate Plaza
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
(859) 219-9090
COUNSEL FOR PLAINTIFFS

CLERK'S CERTIFICATE

This is to certify that the foregoing Judgment has been served on this the 1st day of June 2004 by mailing true and attested copies to the following:

Hon. Michael D. Risley
Stites & Harbison, PLLC
400 West Market Street, Suite 1800
Louisville, Kentucky 40202-3352
Counsel for Defendant

Hon. J. Dale Golden
Golden & Walters, PLLC
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
Counsel for Plaintiffs

/s/ Janie Smith, DC
CLERK, SCOTT CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
SCOTT CIRCUIT COURT
DIVISION II

GEORGE HOFMEISTER and
KAY HOFMEISTER, his wife — PLAINTIFFS

V. — NO. 00-CI-00030

CINCINNATI INSURANCE
COMPANY — DEFENDANT

INSTRUCTIONS TO THE JURY

EXHIBIT A

INSTRUCTION NO. 1
ELECTION OF FOREPERSON

Immediately upon retiring to the Jury Room, you shall select one of your members to act as foreperson of the Jury.

Nine (9) or more of you may agree upon a verdict. If all twelve (12) agree, the verdict need be signed only by the foreperson; otherwise it must be signed by the nine (9) or more who agree to it.

The nine (9) or more who agree to one verdict need not be the same (9) or more who agree on the other verdicts.

INSTRUCTION NO. 2

You will find for the Plaintiffs, George and/or Kay Hofmeister, under this instruction if you believe from the evidence:

Cincinnati Insurance Company and/or its agent, Dan Murner, did not attempt in good faith to effectuate prompt, fair, and equitable settlement of the Hofmeisters' claims, despite the fact that liability had become reasonably clear in that:

(a) Attorney Murner, as an agent of Cincinnati Insurance Company, misrepresented the amount of insurance coverage that was available to the Hofmeisters regarding their claim;

OR

(b) Cincinnati Insurance Company and/or its agent, Dan Murner, failed to promptly settle a portion of the claims of George and/or Kay Hofmeister where liability had become reasonably clear in order to influence the settlement of other portions of the claims of George and/or Kay Hofmeister;

OR

(c) Cincinnati Insurance Company failed to promptly provide a reasonable explanation of the basis in the insurance policy in

relation to the facts or applicable law of the case for denying the settlement of sum or all of George and/or Kay Hofmeister's claims;

AND

(d) That such conduct was carried out with an evil motive on the part of Cincinnati Insurance Company or with reckless indifference to the rights of George and Kay Hofmeister.

Do you find for Plaintiffs, George and Kay Hofmeister, under this instruction?

YES NO

_____

Foreperson, if unanimous

/s/ Angela Ewing

Nine or more who agree, if not unanimous

/s/ Angela Ewing

/s/ Charlene Lucas

/s/ Deborah Demarest

/s/ Lisa Perkins

/s/ Bev Wallace

/s/ Daniel Smith

/s/ Karl Schreiber

/s/ Anthony W. Brooks

/s/ Lester Brewer

/s/ Christopher Patrick

/s/ Nancy Riley

INSTRUCTION NO. 3

You will find for the Plaintiffs, George and Kay Hofmeister, under this instruction if you believe that there is clear and convincing evidence that:

(a) Dan Murner's actions were calculated to advance the cause of Cincinnati Insurance Company or were appropriate to the normal scope of his employment by Cincinnati Insurance Company, making Dan Murner an agent for Cincinnati Insurance Company;

AND

(b) Cincinnati Insurance Company or its agent made a material representation that there was only one (1) million dollars in insurance coverage. A representation is material when it relates to some matter that is so substantial as to influence the party to whom it was made;

AND

(c) The representation was false;

AND

(d) The representation was made with knowledge of its falsity or recklessly without any knowledge of its truth, and as a positive assertion;

AND

(e) The representation was made with the intention that Plaintiffs rely upon it;

AND

(f) The plaintiffs acted in reliance on the representation;

AND

(g) As a result of acting in reliance on the representation, the plaintiffs thereby suffered injury.

Otherwise, you will find for Cincinnati Insurance Company under this Instruction.

Under this Instruction, we find for:

___X___ Plaintiffs, George and Kay Hofmeister

_____ Defendant, Cincinnati Insurance Company

_____
Foreperson, if unanimous

/s/ Angela Ewing
Nine or more who agree, if not unanimous

/s/ Deborah Demarest

/s/ Lisa Perkins

/s/ Bev Wallace

/s/ Daniel Smith

/s/ Anthony Brooks

/s/ Lester Brewer

/s/ Christopher Patrick

/s/ Nancy Riley

/s/ Angela Ewing

INSTRUCTION NO. 4

You will find for the Plaintiff, Kay Hofmeister, under this instruction if you believe, from the evidence:

(a) That the conduct of the Defendant, Cincinnati Insurance Company, and/or through its agent, Dan Murner, in the settlement or compromise of the initial lawsuit between George and Kay Hofmeister and Dasher Express was intended to cause emotional distress to the Plaintiff, Kay Hofmeister;

(b) That such conduct did in fact cause the Plaintiff, Kay Hofmeister, to suffer severe emotional distress; and

(c) That the conduct on the part of the Defendant, Cincinnati Insurance Company, and/or its agent, Dan Murner, in the settlement or compromise of the initial lawsuit between Kay Hofmeister and Dasher Express clearly exceeded the bounds of common decency as would be observed in any civilized community.

You are further instructed that for purposes of this instruction you are not to consider any evidence concerning the actions of Dan Murner or Cincinnati Insurance Company in pursuing Cincinnati Insurance Company's legal rights in the initial lawsuit between George and Kay Hofmeister and Dasher Express.

Do you find for the Plaintiff, Kay Hofmeister, under this instruction?

YES NO

_____
Foreperson, if unanimous

/s/ Angela Ewing
Nine or more who agree, if not unanimous

/s/ Charlene Lucas

/s/ Deborah Demarest

/s/ Bev Wallace

/s/ Daniel Smith

/s/ Gary R. Cullom

/s/ Karl Schreiber

/s/ Anthony Brooks

/s/ Lester Brewer

/s/ Nancy Riley

/s/ Angela Ewing

INSTRUCTION NO. 5

If you find for the Plaintiffs, George and Kay Hofmeister, you may determine from the evidence and award a sum or sums of money that will fairly compensate George and Kay Hofmeister for such of the following damages as you believe from the evidence they have sustained directly by reason of the conduct of Cincinnati Insurance Company:

(a) Mental anguish of Kay Hofmeister:
(not to exceed $50 million)
JURY ANSWER: $ 0

(b) Damages to George and Kay Hofmeister for reduction of net worth:
(not to exceed $28,405,500.00)
JURY ANSWER:
$ 10,000,000. Million
10 million

_____
Foreperson, if unanimous

/s/ Angela Ewing
Nine or more who agree, if not unanimous

/s/ Charlene Lucas

/s/ Deborah Demarest

/s/ Lisa Perkins

/s/ Bev Wallace

/s/ Daniel Smith

/s/ Karl Schreiber

/s/ Anthony Brooks

/s/ Lester Brewer

/s/ Christopher Patrick

/s/ Nancy Riley

INSTRUCTION NO. 6
PUNITIVE DAMAGES

If you find for George and Kay Hofmeister and award them a sum or sums in damages under Instruction 5, and if you are further satisfied from the evidence that Cincinnati Insurance Company acted in reckless disregard for the lives, safety, or property of George and/or Kay Hofmeister, you may, in your discretion, award punitive damages against Cincinnati Insurance Company in addition to the damages awarded under Instruction No. 5.

You are further instructed that:

In determining the amount, if any, of punitive damages, you shall consider the following:

(a) The harm to George and Kay Hofmeister as measured by the damages you have awarded under Instruction No. 5 and the potential of future harm to George and Kay Hofmeister because of the conduct of Cincinnati Insurance Company and/or its agents,

AND

(b) The degree, if any, to which you find the conduct of Cincinnati Insurance Company and/or its agents toward George and Kay Hofmeister to have been reprehensible.

If you award punitive damages, you will state the amount separately from the sum or sums awarded under Instruction No. 5.

"Punitive damages" are damages to be awarded for the sole purpose of punishing the reckless disregard of lives, safety, or property and discouraging it in the future.

We, the jury, award the Plaintiffs
(Not to exceed: $78,405,500.00):
JURY ANSWER

_____
Foreperson, if unanimous

$18,405,500.00
Nine or more who agree, if not unanimous

/s/ Angela Ewing

/s/ Charlene Lucas

/s/ Deborah Demarest

/s/ Lisa Perkins

/s/ Bev Wallace

/s/ Daniel Smith

/s/ Lester Brewer

/s/ Karl Schreiber

/s/ Nancy Riley

/s/ Christopher Patrick

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(2)

No. 09-179

Supreme Court, U.S.
FILED
SEP 11 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GEORGE HOFMEISTER, ET UX.,
Petitioners,

v.

CINCINNATI INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

BRIEF IN OPPOSITION

JOHN T. BALLANTINE
STOLL KEENON OGDEN PLLC
SUITE 2000
500 WEST JEFFERSON STREET
LOUISVILLE, KY 40202-2874
(502) 333-6000

MICHAEL D. RISLEY
STITES & HARBISON PLLC
400 WEST MARKET STREET
SUITE 1800
LOUISVILLE, KY 40202-3352
(502) 587-3400

RONALD L. GREEN
Counsel of Record
BOEHL STOPHER & GRAVES LLP
444 WEST SECOND STREET
LEXINGTON, KY 40507
(859) 252-6721

Attorneys for Respondent

September 11, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800 890 5001

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Cincinnati Insurance Company, respectfully submits this Response in opposition to Petitioners' Petition for a Writ of Certiorari to review the judgment of the Commonwealth of Kentucky Court of Appeals.

OPINIONS BELOW

The Court of Appeals reversed the judgment of the Trial Court by an Opinion rendered on September 26, 2008. Pet. App. A. On September 30, 2008, Petitioners filed Motions to Strike Portions of the Opinion, for Intermediate Relief, and for an *En Banc* hearing. App. A. The Court granted the Motion to Strike and for Intermediate Relief, but denied the request for a hearing by a different panel or *en banc*. App. B. On October 17, 2008, the Court of Appeals rendered a revised Opinion, again reversing the judgment of the Trial Court. App. C. No Petition for Rehearing was ever filed. On November 6, 2008, Petitioners filed a Motion for Discretionary Review with the Kentucky Supreme Court. App. D. That Motion was denied on May 13, 2009, and the order denying the motion further ordered that the Court of Appeals' Opinion was not to be published. App. E. No reason was given for the order de-publishing the Opinion, but since the "offending" portions had been struck, the reason could not have been a concern about Petitioners' attorney's allegedly injured feelings.

JURISDICTION AND FAILURE TO PRESERVE

The Petition lists four questions presented, but as the Argument reveals, the first and second Questions are in fact the same, while the third and fourth Questions also combine to be one. The Petition does not anywhere attempt to address the requirement (whether jurisdictional or premised on comity) that the alleged federal question being presented be preserved for review in the state Court as required by Sup. Ct. Rule 14(1)(g)(i) which provides as follows:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

The Petition contains no such statement, and in fact the Petition is the first mention of any federal question germane to the Petition.

This Court on many occasions has stated that "[w]e cannot decide issues raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 998 (1973) (citing *Cardinale v. Louisiana*, 394 U.S. 437, 89 S. Ct. 1161 (1969)). The petitioner in that case did not raise the questions below and the Arizona Supreme Court had therefore been unable to pass upon those issues. *Id.* Petitioners here carry the burden of showing that they properly presented the claims they raise here before both the Kentucky Court of Appeals and the Supreme Court of Kentucky. Most recently, this Court examined this fundamental principle in *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028 (1997). Unable to improve on the Court's description of the basic principles, Respondent incorporates this Court's assessment as follows:

> With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. As petitioners concede here, the Alabama Supreme Court did not expressly address the question on which we granted certiorari.
>
> Nor have petitioners met their burden of showing that the issue was properly presented

> to that court. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here. We have described in different ways how a petitioner may satisfy this requirement. In some cases, we have focused on the need for petitioners either to establish that the claim was raised "'at the time and in the manner required by the state law,'", or to persuade us that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment. In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time."

Id. at 86-87, 117 S. Ct. at 1029-30 (citations omitted). The Petitioners have utterly and totally failed to even address this requirement, and had they addressed it, the Petition would make clear that the requested writ cannot and should not be issued.

In the original state court appeal, the Respondent was the Appellant, but the Petitioners filed a cross appeal. While the first two questions presented could not be raised until after the first opinion was issued, it is clear from the Kentucky Court of Appeals opinion that no federal question was presented as to the attorney-client relationship in Kentucky. Four briefs were filed by the parties in the Kentucky Court of

Appeals, and in none did any party suggest that the practice of law was a federal issue.[1]

The Petitioner did not file a Petition for Rehearing with the Kentucky Court of Appeals asserting that its Opinions raised a question under the United States Constitution as would have been appropriate under the Kentucky Rules of Civil Procedure, Rule 76.32. Instead, Petitioners filed a Motion to Strike which was treated as three separate motions by the Kentucky Court of Appeals. App. A. The first and primary request was to strike two passages from the Kentucky Court of Appeals opinion which allegedly offended Petitioner's counsel. The two passages are set forth in the Petition at page sixteen.

The first passage simply noted that, in attempting to fabricate a bad faith claim, Petitioners' attorney may be the type of attorney the Kentucky Supreme Court had referred to in a prior case when cautioning about the improper use of "bad faith" actions to simply extort a larger settlement. At the outset, it should be noted that this is an accurate assessment of the misconduct by counsel in the handling of this case at trial as demonstrated by the record and the Kentucky

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[1] To demonstrate this fact the most efficiently, the Respondent has attached partial briefs hereto. Each partial brief contains the Table of Points and Authorities (if applicable) and the portion of the brief addressing the issue. The Trial Court had ruled and instructed the jury that defense counsel was the agent of the insurer. Appellant Brief, App. F; Combined Brief from Appellees/Cross-Appellants, App. G; Combined Brief from Appellants in Reply and Cross Appellees, App. H; and Cross Appellant Reply Brief, App. I

Court of Appeal's opinion.[2] Petitioners' complaint about this passage had nothing to do with due process, but instead was that "this portion of the opinion is nothing more than a personal attack against attorney Golden, and could be seen as evidence of bias or personal animosity on behalf of the involved judges." App. A at 5b. Further, in terms that fully disclose the lack of respect for the judicial process that runs rampant through the facts of this case, counsel wrote:

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[2] Judge Acree described the factual basis, at least in part as follows:

> On February 9, 2001, Golden wrote a peculiar letter[FN8] to Murner ostensibly attempting to settle one portion only of his clients' claims. The letter did not present any *offer* to settle. On the contrary, Golden was attempting to resurrect and accept one portion of Dasher's June 22, 2000, offer that Hofmeister rejected *in toto* eight months earlier. With still no proof of future medical expenses, Golden, on behalf of the Hofmeisters, wanted now to accept that portion of Dasher's previous offer. He wanted Murner to explain the "decision to withdraw the offer of settlement of $25,000[.]" He also wanted to know why Hosmeister could not accept one portion of the offer without accepting the other portions. In Golden's opinion, this violated Kentucky's UCSPA. Using the same wording as KRS 304.12-230(13), Golden claimed this amounted to "failing to promptly settle a claim where liability has become reasonably clear under one portion of the insurance policy coverage in order to influence settlement under another portion of the coverage afforded by [CIC]." Pet.App.A at 19-20.
>
> [FN8] The oddity of Golden's letter surpasses the "curious letter" described in *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 495 (Ky.1976), which is similar to some of Golden's other correspondence.

> Unfortunately, as this Court is surely aware, there is a class of jurists who exhibit a personal bias against attorneys who zealously advocate for their clients, be it Plaintiffs or Defendants. This Opinion, penned by Judge Acree and joined by Special Judge Knopf, left unchanged, would not exclude Judge Acree or Special Judge Knopf from this class of jurists.

App. A at 6b (footnote omitted). There was no mention of any federal issue.

The second passage was simply a factual statement concerning the fact that attorney Golden also represented the Respondent's insured's employee even though he had just sued him in the underlying action in this case, and that they had also filed a "bad faith" action against the Respondent. While it was claimed that this unusual and likely unethical conduct was not germane to the issues on appeal, this was simply untrue. Even more importantly, the Petitioners, through attorney Golden, suggested that removal of these two passages would satisfy them. In their motion they said:

> For these reasons, so as to make clear that the panel had no intention of besmirching either the character of attorney Golden as a zealous advocate for his clients, or the character of Judge Acree and Senior Judge Knopf as fair and impartial jurists, and to leave no doubt as to the Court's pronouncements on matters not properly before the Court, the above-referenced sections of the Opinion should be stricken immediately.

App. A at 7b. There was no mention of any federal issue. The other requests made in the motion were procedural and offered the Court no additional legal issues to consider. Contrary to the assertion in the Petition, the decision to strike those two passages was made by the same panel which rendered the original Opinion, most likely based on the representation that such action would satisfy attorney Golden's concerns. Based on Petitioners' subsequent actions, the above statement in the Motion to Strike was simply one more instance of a misrepresentation to the Kentucky Court.

In Kentucky, the actions of the court of general jurisdiction, the Circuit Court, are reviewable as a matter of right by the Kentucky Court of Appeals. Access to the Kentucky Supreme Court depends on the discretion of that Court, which is triggered by filing a Motion for Discretionary Review. On November 6, 2008, Petitioners filed a Motion for Discretionary Review with the Kentucky Supreme Court. App. D. The filing of such a motion is governed by Kentucky Rules of Civil Procedure, Rule 76.20. That Rule provides in pertinent part as follows:

> (3) The Motion.
>
> The motion shall designate the parties as Movant(s) and Respondent(s), shall not exceed fifteen (15) pages in length, unless otherwise authorized by the Court, and shall contain the following:
>
> . . .
>
> (d) A clear and concise statement of (i) the material facts, (ii) the questions of law involved,

> and (iii) the specific reason or reasons why the judgment should be reviewed . . . .

In this case, the Petitioners did in fact list the legal issues as to which they sought review, which were as follows:

> 1. As set forth in the Court of Appeals Opinion, "[w]hat legal relationship exists between an insurer and legal counsel hired to defend its insured? Surprisingly, Kentucky has never addressed this question squarely, but the answer is crucial to resolution of this case."
>
> 2. Is the relationship of an insurance company with its defense counsel hired to defend its insured, that of an independent contractor, agent or otherwise, and what is that relationship when the attorney conducts the settlement negotiations on behalf of the insurance company?
>
> 3. Can a party preserve all objections by a general reference to motions for summary judgment, motions for directed verdict and post-trial motions; or must a party comply with KRE 103 and make an objection or preserve the error by a motion *in limine*, and cite the record to the place where the error was preserved?
>
> 4. Did CIC "open the door" to litigation conduct by naming all four of the attorneys to the underlying tort claim on its Witness List and allowing Murner to testify without objection? Also, can CIC delegate its non-delegable duties under the UCSPA?

5. Are objections to jury instructions preserved pursuant to CR 51(3) when the first objection to the jury instructions on the record appears immediately after the trial transcript indicates that the jury had already left for deliberations?

6. Was Murner CIC's agent for settlement purposes?

7. Did the Court of Appeals err in finding that the trial court should have entered a directed verdict in favor of CIC on the claim of violations of the UCSPA and the issue of fraudulent misrepresentation?

8. Whether the Court of Appeals erred in its ruling that the jury's verdict was affected by the cumulative effect of Plaintiffs' counsel's behavior.

9. Whether the Court of Appeals erred in its ruling that the Hofmeisters failed to prove economic loss caused by CIC?

10. If an insurance company increases its reserve to $1 million on June 9, 2000 because it finds that an employee was acting within the scope of his employment with the insured employer, and waits almost 2-1/2 years to offer the $1 million limits, is the trial court's decision to uphold the bad faith verdict on motion for directed verdict clearly erroneous or palpably or flagrantly against the evidence?

11. Is it appropriate for the Court of Appeals to resurrect, analyze, argue, and use issues that

were decided by the trial court in its September 13, 2002 summary judgment order, an order that was never appealed, to create a reasonable basis for the delay in CIC's payment of its limits to Hofmeister?

12. Is a 1.8 ratio of compensatory to punitive damages sufficiently high to warrant a reduction in punitive damages?

13. In the Hofmeisters' claim, was it appropriate for the trial judge to disallow any jury instructions for future economic harm?

14. Is it still the law in Kentucky that when a fraud has been perpetrated to induce a party to enter into a contract, that the injured party may elect to affirm the contract and recover damages in tort, or disaffirm the contract and recover the consideration with which he has parted?

15. Are Kentucky citizens, such as George Hofmeister, injured in a motor vehicle collision, third-party beneficiaries to the insurance contract between the tortfeasor and its insurance company, thereby creating rights by operation of law pursuant to Central Mut. Ins. Co. v. Pippen?

16. Can an attorney step outside the bounds of being an independent contractor for purposes of establishing liability against an insurance company and can an attorney opine that an employee is acting within the scope of the employee's employment and then file a

crossclaim against that same employee with the insurance company having full knowledge of the conduct and the insurance company avoid liability?

17. Can CIC successfully secret documents exchanged between CIC and Murner by claiming that those documents are subject to the attorney-client privilege or is CIC now judicially estopped from claiming that Murner was not CIC's attorney/agent?

18. Did Murner have implied, apparent or ostensible authority in dealing with the Hofmeisters to the extent that the Hofmeisters would suffer a loss were CIC allowed to escape from the consequences of a situation which it caused or permitted?

19. Does CIC have independent non-delegable duties under the UCSPA or, in the alternative, is CIC responsible for Murner's settlement offers pursuant to Restatement (Second) of Agency §§ 251(a) and 255?

20. Because it is undisputed that CIC's $500,000.00 offer went to $1 million within five minutes, is the trial court's decision to uphold the bad faith verdict on motion for directed verdict clearly erroneous or palpably or flagrantly against the evidence?

21. Is a jury trial still available for claims under the UCSPA?

App. D at 104b-109b. There is absolutely no mention of either the Kentucky or United States Constitution, nor is there any mention that Petitioners thought they had been denied their appeal rights under the Kentucky Constitution. While the Petitioners did ask the Kentucky Supreme Court to adopt their view of the attorney client relationship in the tripartite context, they at no time suggested that a federal question was presented. In short, there is no legal issue listed which can fairly be said to be analogous to any Question Presented in the Petition. Accordingly, this Court's comments in *Adams* are equally apposite here, to-wit:

> Petitioners having thus failed to carry their burden of showing that the claim they raise here was properly presented to the Alabama Supreme Court, we will not reach the question presented. We need not decide in this case whether our requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential, because even treating the rule as purely prudential, the circumstances here justify no exception.

520 U.S. at 90, 117 S. Ct. at 1031 (citations omitted). For this reason the Petition should be summarily denied.

Additionally, it should be noted that as to Questions three and four, no federal question is alleged. While the questions both contain the word "constitution" in one form or another, there is no suggestion that the United States Constitution is implicated. Even more important, in the argument associated with these questions, there is no mention of

any constitution. Pet. at 24-34. Even if it is assumed that Petitioners were intending reference to the United States Constitution, the Petition does not identify any particular constitutional right which is offended when States make their own rules concerning the practice of law. Accordingly, this portion of the Petition should be dismissed for want of jurisdiction due to the absence of a federal question.

COUNTERSTATEMENT OF THE CASE

The Petition sets forth facts which Petitioners suggest demonstrate the "bad faith" on which their claim is based. These facts are only germane to the issues set forth in the Petition to the extent they bear on the accuracy of the two passages in the first Opinion to which attorney Golden objected. The reality is that the "bad faith" case asserted by Petitioners, like the business of Mr. Hofmeister, was a house of cards destined for collapse independent of this case. The briefs which Petitioners filed with the Kentucky Court of Appeals were replete with misrepresentations and/or exaggerations of the record, which substantially complicated the task undertaken by the panel below. That behavior has continued to manifest itself in Petitioners' pleadings to the Kentucky Supreme Court and this Court, as the examples below will demonstrate.

1. On page 5 of their Petition, the Petitioners state that "**Carl Sumner could not explain CIC's offers in the underlying tort claim**. . ." In the Kentucky Courts below, the Petitioners claimed that Mr. Sumner was their main witness. Mr. Sumner had been identified by Respondent as a possible expert witness, but was not called by Respondent at trial. Instead the

witness was called by the Petitioners. The Petitioners then attempted to prove facts by suggesting that Mr. Sumner was not aware of those facts. The Petitioners' burden of production could not be met by simply asserting that Mr. Sumner had no knowledge of some fact. More important, however, is the fact that this representation of the record is simply false, as Mr. Sumner testified at some length that the rationale, as expressed by the testimony concerning the various offers, was reasonable.

2. On page 5 and 12, the Petitioners **describe the offers made by Dasher** by reducing them by $150,000.00 in an effort to make them look less substantial than they were. In footnotes 12 and 19, Petitioners do at least mention the alleged basis for the reduction. However, there are no circumstances under which a no-fault insurer or an underinsured motorist insurer would be entitled to any portion of the sums paid by another tortfeasor under Kentucky law. This is a prime example of the tendency on the part of the Petitioners to simply make things up and state them as fact.

3. On pages 6 and 8, the Petition refers to a **Reserve Increase Memorandum**. The Trial Court excluded the proof concerning the setting of reserves, and no appeal was taken by the Petitioners as to this issue. That ruling is now the law of the case, and how or why reserves were set at any particular time is not material to any issue presented by the Petition. Furthermore, at the time in question Respondent knew that the claim involved a substantial economic loss portion, and did not yet know that this was just a self-assessed bonus and that Petitioners would be able to produce no documentation to support such a claim.

4. At the top of page 7, the Petition asserts that "**Mr. Hofmeister's W-2 earnings decreased by approximately $5 million from 1998 to 1999.**" This statement is technically true (absent the assertion of causation), but the Petition fails to mention that there was a bonus Mr. Hofmeister paid himself in 1998, but did not pay himself in 1999.

5. On page 8, the Petition asserts that "**CIC never brought a declaratory judgment action on the scope of employment issue due to the fact it, as well as Murner, had concluded that Clark was acting within the scope of his employment.**" There is simply no factual basis for such a statement. The Petition itself reflects the fact that scope and course was disputed until the trial Court granted summary judgment on September 13, 2002. Pet. at 12. Likewise, had it been "concluded" that Clark was in the scope of his employment, Clark's personal carrier, Travelers, would not have been providing a defense, or offering to pay its limits. This misrepresentation is repeated at page 12, footnote 18.

6. At the bottom of page 8, the Petition asserts that **"Murner participated in resolving the coverage issue."** As the Court of Appeals found at page 46 of its Opinion, there is no basis for this allegation. Murner's role with respect to the issue was limited to whether his client was vicariously liable for the conduct of its employee. While the question of whether Clark was an insured under the policy may have turned on the same or similar facts, there is no evidence that Murner was ever consulted about, or gave advice with respect to, coverage.

7. On pages 8 and 9, the Petition states that the filing of a cross-claim by Dasher "**was designed to raise questions in the mind of the Hofmeisters and manufacture an ostensibly reasonable basis for CIC to make low-ball offers**". There is no evidence that attorney Murner ever discussed the application of coverage to Clark with attorney Golden, or that Golden ever made an inquiry. The Petitioners had access to the same facts concerning scope of employment as did attorney Murner or Respondent, and were fully capable of drawing their own conclusions. The Petitioners apparently felt that there was some issue on the point in that they accepted limits from Clark's personal automobile insurer, which would not have been payable if Clark was in the scope and course of Dasher as alleged. If Petitioners' counsel interpreted the filing of a cross claim by Dasher against Clark, where Clark was being separately defended by his personal insurer, as a representation concerning coverage, and there is no evidence that he actually did, then this reflects on their counsel's poor judgment, not fraud on the part of attorney Murner.

8. The Petition further asserts on page 9 that **the omission of Fireman's Fund (the excess carrier) from the release tendered in June of 2000** supports the claim that attorney Murner misrepresented the existence of the excess policy since Fireman's Fund was included in a release tendered in 2002. The uncontroverted proof is that attorney Murner was not aware of an excess policy in June of 2000, but subsequently learned of it and then advised the Petitioners' counsel of said fact. Opinion at 55-56. In fact, when the case did settle, the discussions were on the record. The existence of the excess policy was well known and Petitioners' counsel showed no sign of

surprise and continued with the negotiations. Opinion at 55-56; Tr. Oct. 14, 2002, App. J. Thus, the tendered releases actually undermine the Petitioners' key claims rather than support them.

9. In the Petition at pages 10 and 11, the Petitioners continue to insist that they **did not withdraw their $1 million demand**. No matter what any witness said or recalled at the time he was asked, the demand was withdrawn in writing, which writing was a trial exhibit. *See* App. K (June 22, 2000 letter from attorney Golden to attorney Murner). The same day the initial offer was made, instead of making any kind of counter proposal, attorney Golden wrote:

> I am in receipt of your June 22, 2000 correspondence regarding the above-referenced matter. Please be advised that your proposed settlement offer is rejected and that we hereby withdraw our offer to settle this matter for the policy limits of $1 million.

Quod erat demonstrandum. There is no evidence of record as to when, if at all, the demand was supposedly reinstated, but it is clear that it was the Petitioners, not Respondent or attorney Murner, who refused to negotiate. This was part and parcel of attorney Golden's attempt to create a "bad faith" claim where none really existed.

10. On page 11, the Petition asserts that "Hofmeisters' financial outlook . . . was so bright that **Mr. Hofmeister was negotiating for a $25 million 'unsecured' line of credit**." The Petitioners fail to advise this Court of the uncontroverted proof that the loan was rejected for reasons unrelated to the accident

with Clark. How an unsuccessful negotiation for a loan demonstrates a "bright financial outlook" remains unanswered.

11. On page 12, Petitioners state that the summary judgment in the underlying action which decided that Clark was in the scope and course of his employment was not contested, but this is only because Respondent decided to settle that underlying case.

12. On page 15, the Petition suggests that one of Mr. Hofmeister's **creditors, Allied Capital, intervened at the request of Murner**. As is common in such cases, attorney Murner was aware of some of the many creditors who were obtaining judgments against Mr. Hofmeister, but there is no evidence that attorney Murner directed or had any other connection to any creditor and how they chose to enforce their judgments. Furthermore, there is no evidence that this information was shared with Respondent.

The foregoing are simply the most flagrant misrepresentations or misstatements found in the Petition, and it should not be inferred that any statement not listed here is therefore true and correct. Remove the misrepresentations and misstatements and the underlying action was a typical litigation which changed over time and was ultimately settled. The only "bad faith" was on the part of the Petitioners in resisting discovery, refusing to substantiate their claims, and playing games with settlement discussions. Any judge would be justified in reaching the conclusions reached by Judge Acree as set forth in the two passages.

ARGUMENT

I. THE OPINION OF THE COURT OF APPEALS DOES NOT IMPLICATE IN ANY WAY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The two passages to which Petitioners point do not show bias towards Petitioners' counsel, and there is no basis for suggesting that the Opinion of the Court of Appeals was incorrectly decided, let alone in violation of any provision of the United States Constitution. Furthermore, the passages, to the extent they reflect anything, relate to the conduct at issue in the case under review. Perhaps, to some extent, any judge develops bias in favor of one party or another in forming his or her opinion in the case, but this is not bias in the sense described by this Court in the context of due process. The cases describe an entirely different type of bias, usually one that precedes the formation of the opinion or based on facts unrelated to the case under review.

The statement that attorney Golden may fall into the class which the Kentucky Supreme Court had identified as abusers of the "bad faith" cause of action, in addition to being true, reflects a real problem in Kentucky. Kentucky is one of a handful of states which has made the mistake of converting the Unfair Claims Settlement Practices Act, Ky. Rev. Stat. Ann. § 304.12-230, into a private cause of action which can be brought by a person who has no rights under the

insurance policy.[3] It has become frequent for some attorneys to add a claim against the insurer without any real basis for the sole purpose of trying to enhance the value of the case.[4] Occasionally, but not as frequently, some attorneys will do what was done by attorney Golden here; actually try to fabricate a "bad faith" claim. This type of lawsuit has become a cancer on the tort system, and the Kentucky Court is just beginning to recognize that fact. Thus, the comment by the Court of Appeals was germane to this case.

The significance of the second comment concerning attorney Golden's representation of the driver Clark is more difficult to discern. The Court stated that it seems strange that a person that attorney Golden sued would retain him to bring a "bad faith" claim against the same insurer. This is simply a true statement. There must be facts which are known only to attorney Golden which make this suggestion more than it is. Perhaps he knows that this relationship arose out of improper conduct on his part, or perhaps he is just hyper-sensitive. There is no objective reason that the Kentucky Court even meant for it to reflect on attorney Golden personally or professionally, but even if it did it arises out of the facts of the case, not any extraneous bias.

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[3] The statute was intended to protect the consumer, but when extended in this way it actually deprives the consumer of his or her rights in favor of those held by a stranger to the contract.

[4] Most often the actual "bad faith" claim is never pursued, but instead is used to seek discovery that the Plaintiff could not have received from the Defendant/Insured, or, to increase the cost of defense which thereby increases the nuisance value of an otherwise dubious or exaggerated claim.

It is abundantly clear that under Kentucky law the comments do not reflect bias that would be considered a denial of the constitutional right to an appeal in Kentucky. This is buttressed by Kentucky's rules concerning bias. "Dislike of a party or a party's lawyer does not, by itself, constitute a personal bias or prejudice." Ky. Sup. Ct. R. 4.300; Model Code of Judicial Conduct Canon 3(E)(1)(a) (2004) (Commentary). There is simply no authority for the proposition that under Kentucky law Petitioners were denied their right to appeal. Further, the Kentucky Court of Appeals was not asked to consider the question, nor did Petitioners bring this issue to the attention of the Kentucky Supreme Court in their Motion for Discretionary Review.

While it should be made clear that the Respondents reject the idea that there was anything improper about any aspect of the Kentucky Court of Appeals opinion, it is equally clear that the complaints of the Petitioners asserting bias fail to rise to the level that would implicate due process, even if every assertion and contention by attorney Golden were taken as true.

In *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1975), this Court addressed actual bias and described situations to be considered applicable as "those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." *Id.* In the case at hand there are no allegations of any pecuniary interest in the outcome or that the Kentucky Court of Appeals judge had been the target of personal abuse or criticism by either the Petitioners or their counsel prior to the issuance of the initial Opinion.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955). Petitioners were granted a fair appeal in a fair tribunal, and in fact this Petition does not even attempt to advance the interests of the Petitioners, but reflects instead the private interests of counsel. Petitioners have pointed to no evidence of actual bias or any interest in the outcome on the part of any judge who participated in the appeal.

Recently, this Court found that proof of actual bias is not always required to justify recusal. *Caperton v. A T. Massey Coal Co.*, 556 U.S. __, 129 S. Ct. 2252 (2009). In that case, a West Virginia Supreme Court of Appeals judge had received substantial campaign contributions from the Chief Executive Officer of a party, Massey Coal Co. *Id.* at 2257. This Court found that "[t]he facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case." *Id.* at 2265. Again, the bias was related to conduct outside the facts that were presented on appeal. In discussing the circumstances under which recusal would be required, this Court stated that "[u]nder our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker

is too high to be constitutionally tolerable.'" *Id.* at 2257 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). In its opinion in *Caperton*, this Court makes several references to the extraordinary situation or extreme facts that have led the West Virginia Court to order recusal. The Court stated that "[t]his Court's recusal cases are illustrative. In each case the Court dealt with extreme facts that created an unconstitutional probability of bias that 'cannot be defined with precision.'" *Id.* at 2265 (internal citations omitted). This is not the case with the Petitioners. There are no such extreme or extraordinary circumstances that would require the Kentucky Court to order recusal because there is no evidence of any actual bias or partiality. Courts are often called upon to assess alleged misconduct by a party and/or counsel. Such was the case herein. If it were an indication of bias to describe attorney misconduct in factually accurate terms, attorney misconduct could never be passed upon by a judge. There is no federal question raised by this Petition concerning the Petitioner's right to appeal under the Kentucky Constitution and therefore the Petition should be denied.

II. THE REGULATION OF THE PRACTICE OF LAW IS NOT WITHIN THE POWERS DELEGATED BY THE STATES TO THE FEDERAL GOVERNMENT.

It is very difficult to formulate a response to this aspect of the Petition because the Petition simply asserted that there are two ways to view the triparte relationship and that Petitioners think one is better than the other. In other words, the entire country should abandon federalism so attorney Golden can win his case. Even this concept is fallacious since there is

no reason to believe that, were Kentucky forced to adopt what Petitioners refer to as the "Dual Client Model," the result in this case would change. The lack of vicarious liability as set forth in the jury instructions was just one of many grounds for reversal. There is nothing in the Opinion to suggest that the result would have been different had Respondent been held responsible for every strategic and/or litigation decision made by attorney Murner in his defense of the insured, or that attorney Murner engaged in any inappropriate conduct, so this entire issue is a red herring.

Furthermore, the Petition offers no suggestion as to what provision of the United States Constitution Petitioners feel is offended by State laws governing the relationship between client and counsel, inside or outside the insurance context. Accordingly, Respondents cannot even ascertain what portions of the Constitution should be discussed. This is just as well since the Petition does not suggest how this area of law could ever become a federal question. All that is said is that Petitioners think it would be better if the attorney were the client of both the insurer and insured. It is doubtful that attorney Golden's insurance "clients" would agree, and it is not clear how he has reconciled his taking of this position which is clearly adverse to their interests.[5] In any event, there are substantial public policy reasons supporting the Kentucky rule, not the least of which is that one lawyer cannot serve two masters. In Kentucky, as

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[5] In his Motion to Strike attorney Golden advised the Court of Appeals that nearly 100% of his firm's work is for insurance defense clients. App. A at 8b.

with many other states, the "One Client" approach promotes the interests of the person who is being represented over the person who has agreed to pay for the defense. While other States are free to regulate the practice of law as they see fit (within the limitations on state power as set forth in the Bill of Rights), so is Kentucky. There is no federal interest in uniformity, and in fact the idea of multiple laboratories for the incubation of ideas and options is a basic strength of this country and endorsed by the Constitution itself. It is respectfully submitted that the Petition provides no basis for review by this Court, and the Petition should be dismissed.

CONCLUSION

For the reasons set forth hereinabove it is respectfully submitted that the Petition for Writ of Certiori should be denied.

Respectfully submitted,

Ronald L. Green
Counsel of Record
BOEHL STOPHER & GRAVES LLP
444 West Second Street
Lexington, KY 40507
(859) 252-6721

John T. Ballantine
STOLL KEENON OGDEN PLLC
Suite 2000, 500 West Jefferson Street
Louisville, KY 40202-2874
(502) 333-6000

Michael D. Risley
STITES & HARBISON PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202-3352
(502) 587-3400

ATTORNEYS FOR THE RESPONDENT,
CINCINNATI INSURANCE COMPANY

APPENDIX

APPENDIX A

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2004-CA-002296-MR
AND
NO. 2004-CA-02362-MR

[Dated September 29, 2008]

CINCINNATI INSURANCE COMPANY APPELLANT/CROSS-APPELLEE	)
VS.	)
GEORGE HOFMEISTER and KAY HOFMEISTER, His Wife APPELLEES/CROSS-APPELLANTS	)

MOTION TO STRIKE PORTIONS OF THE COURT'S OPINION WITH REQUEST FOR *EN BANC* HEARING AND MOTION FOR INTERMEDIATE RELIEF, PURSUANT TO CR 76.33, TO IMMEDIATELY STRIKE THOSE PORTIONS OF THE OPINION

*** *** *** ***

Come the Appellees/Cross-Appellants, George and Kay Hofmeister, attorney J. Dale Golden and the firm of Golden & Walters, PLLC, and hereby move the Court for an Order striking portions of the Opinion

rendered on September 26, 2008 in the above-styled action, and for a hearing of the Motion *en banc* by the entire Court of Appeals. In addition, the Movants move this Court, pursuant to CR 76.33, to immediately strike those portions of the Court's Opinion. In support of these Motions, the Appellees/Cross-Appellants hereby state as follows:

I. MOTION TO STRIKE PORTIONS OF THE COURT'S OPINION WITH REQUEST FOR *EN BANC* HEARING

A. Factual/Procedural History

On November 3, 1998, Appellee/Cross Appellant George Hofmeister was involved in a serious automobile accident in Scott County, Kentucky. As a result of this accident, Hofmeister sustained serious bodily injuries that affected his activities of daily living and his ability to manage his various business interests. At the time of the accident, the tortfeasor, Eugene Clark, was acting within the course and scope of his employment with Dasher Express, Inc. On behalf of George Hofmeister and Kay Hofmeister, his wife, attorney Dale Golden and the firm of Golden & Walters, PLLC initially filed suit against Eugene Clark for automobile negligence and against his employer, Dasher, for vicarious liability. The Hofmeisters also filed suit against Kentucky Farm Bureau Insurance, their insurance carrier, seeking UIM benefits.

During the course of the litigation, certain events unfolded that led the Hofmeisters to amend their initial Complaint to assert additional claims against Dasher's insurance carrier, Cincinnati Insurance

Company ("CIC"), for, among other things, statutory bad faith. In a nutshell, the basis of these claims arises from the fact that CIC concealed the existence of an excess policy that would have provided additional coverage to Dasher from the Hofmeisters, thereby coercing a more favorable settlement from the Hofmeisters.

Between November 3, 1998 and October 3, 2002, CIC-made a single offer of settlement. That offer was on June 22, 2000 in the amount of $109,275.00, exclusive of liens. That offer excluded any amount for the Hofmeisters' economic damages, reserving that issue for a jury determination. Then, in the eleven days between October 3, 2002 and the date the trial of the underlying matter was set to begin, October 14, 2002, CIC inexplicably decreased its offer to $25,000.00 ($175,000.00 offer of judgment, less $150,000.00 in Kentucky Farm Bureau liens for advancement of UIM monies and PIP). This offer of judgment was made ten days before trial. The offer was then raised up to $350,000.00 on the morning of trial, with the condition that it had to be accepted prior to the Hofmeisters announcing ready for trial. Finally, after the Hofmeisters had announced ready for trial, the final $1,000,000 offer was made. This offer ostensibly represented the limits of insurance proceeds available to the Defendants (Clark and Dasher). The fact that the offer of CIC was reduced to $25,000.00 and then raised to $1 million, exclusive of the $150,000.00 in Kentucky Farm Bureau liens within 11 days carried no weight in the appellate court's opinion, but certainly caught the attention of the trial judge and the jury.

Much ink has been spilled over what transpired thereafter. For the purpose of this Motion, however, it suffices to say that the Hofmeisters proceeded with their bad faith claims against CIC and were ultimately awarded over $28,400,000 by a Scott County jury. This award was appealed by CIC in November 2004. An Opinion was rendered in this case on September 26, 2008, eighteen months after oral argument was heard, and nearly four and one half years after the jury verdict in the Hofmeisters' favor was rendered. This Motion follows.

B. Certain portions of this Court's Opinion should be stricken because they are not germane to the legal issues raised by the parties and appear to be merely defamatory in nature.[1]

There are two portions of the Court's September 26 2008 Opinion that are not germane to the legal issues raised by the parties, were not the basis of the Court's ultimate decision and could be construed as defamatory against attorney Golden and his firm, Golden & Walters, PLLC. As such, it is respectfully requested that these portions be stricken from the Court's Opinion immediately. Each objectionable portion is addressed specifically below:

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[1] This Motion should in no way be construed to indicate that the Appellees/Cross-Appellants accept or endorse the portions of the Court's Opinion not addressed herein. This Motion is meant to address only the particular portions of the Opinion addressed herein and should not be construed to waive any other potential arguments or recourse that the Appellees/Cross-Appellants may have.

i. Page 71, paragraph beginning, "Our Supreme Court..."

On page 71 of the Opinion, the following excerpt appears:

> Our Supreme Court has recognized that some attorneys exhibit a 'personal bias against insurance companies in favor of using bad faith and UCSPA allegations to extort payment of underlying claims from insurers.' The manner in which Mr. Golden zealously represented the Hofmeisters would not exclude him from this class of attorneys. (Internal citations omitted.)

Clearly, this language, which is found in the final paragraph of the Court's main opinion, has no bearing on the legal arguments raised by the parties in this Appeal and, therefore carries no legal weight. Furthermore, this portion of the Opinion does not provide any factual basis for the Court's other legal reasoning and does not logically flow from any of the Court's preceding or subsequent arguments. In short, this portion of the opinion is nothing more than a personal attack against attorney Golden, and could be seen as evidence of bias or personal animosity on behalf of the involved judges.

Pursuant to SCR 4.300, which codifies the Canons of Judicial Conduct:

> **A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties,**

by words of conduct manifest bias or prejudice...[2]

In certain circles, the portions of the Opinion identified above could be construed as an *ad hominem* attack against attorney Golden and his insurance defense firm. Unfortunately, as this Court is surely aware, there is a class of jurists who exhibit a personal bias against attorneys who zealously advocate for their clients, be it Plaintiffs or Defendants. This Opinion, penned by Judge Acree and joined by Special Judge Knopf[4], left unchanged, would not exclude Judge Acree or Special Judge Knopf from this class of jurists.

C. **Footnote 12, Page 24, referencing *Clark v. Cincinnati Insurance Co*, No. 2005-CA-000356-MR**

In this section of the Opinion, the Court addresses the appeal of another matter that, though factually related to the underlying claim here, has no legal relevance whatsoever to these proceedings. Mr. Clark's subsequent representation by attorney Golden had no legal bearing whatsoever on the issues raised by the parties to this Appeal. This *dictum* could be misconstrued to give the appearance that the Court was pronouncing judgment on the propriety of attorney Golden's representation of Mr. Clark. This issue never having come before the Court, it would be improper for the Opinion to leave the Court's thoughts on this issue open to interpretation.

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[2] SCR 4.30, Canon 3(B)(5)

[4] Judge Keller concurred in result only

For these reasons, so as to make clear that the panel had no intention of besmirching either the character of attorney Golden as a zealous advocate for his clients, or the character of Judge Acree and Senior Judge Knopf as fair and impartial jurists, and to leave no doubt as to the Court's pronouncements on matters not properly before the Court, the above-referenced sections of the Opinion should be stricken immediately.

D. Due to the nature of the issues addressed herein, it would be inappropriate for the original panel to rule on this Motion. It is requested, therefore, that this Motion be referred to an *en banc* panel of the entire Court of Appeals, or, in the alternative, to an alternate three-judge panel selected by the Chief Judge.

Because of the nature of the relief sought in this Motion, the Appellees/Cross-Appellants believe that it would be inappropriate for this Motion to be ruled upon by the original panel assigned to this Appeal. Certainly, in the eighteen months since the oral arguments, the judges on this panel have had ample time to consider the issues raised here and have undoubtedly formed strong opinions as to the appropriateness of the objectionable language. Therefore, it is requested that this Motion be scheduled for an *en banc* review by the Court of Appeals as a whole or, in the alternative, be referred to a separate three-judge panel chosen by the Chief Judge.

II. MOTION FOR INTERMEDIATE RELIEF, PURSUANT TO CR 76.33, TO IMMEDIATELY STRIKE PORTIONS OF THE OPINION.

Due to the danger that the Opinion, as originally rendered, could be misconstrued in such a manner as to cause immediate and irreparable harm to the Appellees/Cross-Appellants and to the business interests of attorney Golden and the Golden & Walters, PLLC law firm, pursuant to CR 76.33, intermediate relief is requested. Specifically, it is requested that the objectionable portions of the Opinion be immediately stricken and the Opinion not be released for final publication until a hearing may be had on this Motion. In support of this Motion, the Appellees/Cross-Appellants hereby state as follows:

The language of the Court's opinion could be construed to besmirch the character of attorney Dale Golden and, by association, George and Kay Hofmeister and the Golden & Walters, PLLC law firm. Release or publication of the potentially defamatory portions of this opinion are likely, to cause immediate and irreparable harm to attorney Golden, his current clients, including George and Kay Hofmeister, and his firm.

As this Court is well-aware, Golden & Walters, PLLC is a fifteen-attorney firm that prides itself on the zealous representation of each of its clients. Though devoting almost one hundred percent of its work to insurance defense clients, Golden & Walters, PLLC believes that each of its clients, be them the insureds of insurance companies, the insurance companies themselves, or injured Plaintiffs such as George and Kay Hofmeister, deserve the best representation that

its individual attorneys can render. Any insinuation or allusion to the fact that attorney Golden is somehow biased against insurance companies is utterly without support. To the extent that the Opinion, as it was originally rendered, could be construed otherwise, it is irreparably damaging to the reputation of attorney Golden and to the future business relations of his firm.

The immediacy of the harm in this instance is apparent. Though discretionary review will certainly be sought, the publication of this Opinion in the widely-read Kentucky Law Summary and online on Lexis and Westlaw is imminent. To the extent that the objectionable portions of the Opinion are improper, only the immediate removal of the Opinion from public consumption will protect the Appellees/Cross-Appellants, attorney Golden and Golden & Walters, PLLC from harm.

Furthermore, once wide-spread publication of this unedited opinion is made, the harm against the Appellees/Cross-Appellants and attorney Golden will be irreparable. Once the potentially defamatory comments are widely-circulated, there will be no way to cure the damage.

Similarly, considering the nature of the issue raised in this Motion, the Appellees/Cross-Appellants respectfully request that this request for intermediate relief, pursuant to CR 76.33, be referred to a non-panel judge for review.

WHEREFORE, the Appellees/Cross-Appellants respectfully request:

1. That the above-referenced portions of the Court's Opinion be stricken;

2. That this Motion be referred for an *en banc* hearing before the Court of Appeals as a whole, or, in the alternative, to an alternate three-judge panel selected by the Chief Judge; and

3. That this Motion, pursuant to CR 76.33, be assigned to a non-panel judge for review of request for intermediate relief.

Respectfully submitted,

GOLDEN & WALTERS, PLLC

/s/ _____

J. Dale Golden
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
Telephone: (859) 219-9090
Facsimile: (859) 219-9292
Counsel for Appellees / Cross-Appellants, George and Kay Hofmeister

* * *

[Certificate of Service omitted in printing of this appendix]

APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2004-CA-002296-MR
AND
NO. 2004-CA-02362-MR

[Dated October 3, 2008]

CINCINNATI INSURANCE COMPANY)
APPELLANT)
)
v.)
)
GEORGE HOFMEISTER, ET AL)
APPELLEES)
)

APPEAL FROM SCOTT CIRCUIT COURT
ACTION NO. 00-CI-00030

ORDER

1. DENYING MOTION FOR RECUSAL OF PANEL AND ASSIGNMENT TO NEW PANEL;
2. DENYING MOTION FOR EN BANC HEARING; AND
3. GRANTING MOTION FOR IMMEDIATE RELIEF BY MODIFYING OPINION RENDERED SEPTEMBER 26, 2008

** ** ** ** **

BEFORE: ACREE AND KELLER, JUDGES; KNOPF,[1] SENIOR JUDGE.

Appellees have filed a motion for immediate and intermediate relief by which they seek 1) assignment of their motion to a panel other than the panel which rendered the opinion in these appeals on September 26, 2008, which the Court has treated as a motion for recusal of the panel; 2) in the alternative, an *en banc* hearing on their motion by the full Court; and 3) the striking of certain language on page 71 of the opinion and the striking of footnote 12 on page 24. Having now considered that motion, the response of the appellant, and being otherwise sufficiently advised, the Court ORDERS that the portions of the motion which request recusal of the panel and/or an *en banc* consideration of their motion by the full Court be, and they are hereby, DENIED.

The portion of the motion which requests immediate and intermediate relief by striking certain language on page 71 and footnote 12 on page 24 of the opinion is hereby GRANTED. The opinion rendered in these appeals on September 26, 2008, is ORDERED WITHDRAWN. A new opinion reflecting solely this modification SHALL BE REISSUED in the near future. Time for filing a petition for rehearing and/or a motion for discretionary review shall be calculated from the date on which the modified opinion is reissued.

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[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KELLER, JUDGE, AND KNOPF, SENIOR JUDGE, CONCUR.

ACREE, JUDGE, DISSENTS FROM THAT PORTION OF THE ORDER WHICH GRANTS MODIFICATION OF THE OPINION.

ENTERED: 10/3/08 /s/_____
JUDGE, COURT OF APPEALS

APPENDIX C

RENDERED: OCTOBER 17, 2008; 10:00 A.M.
TO BE PUBLISHED

OPINION OF SEPTEMBER 26, 2008 WITHDRAWN

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-002296-MR
AND
NO. 2004-CA-002362-MR

CINCINNATI INSURANCE COMPANY APPELLANT/CROSS-APPELLEE	)
v.	)
GEORGE HOFMEISTER AND KAY HOFMEISTER APPELLEES/CROSS-APPELLANTS	)

APPEAL AND CROSS-APPEAL FROM SCOTT
CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 00-CI-00030

OPINION
REVERSING APPEAL NO. 2004-CA-002296-MR
AND

DISMISSING AS MOOT APPEAL NO.
2004-CA-002362-MR
** ** ** ** **

BEFORE: ACREE AND KELLER, JUDGES; KNOPF,[1] SENIOR JUDGE.

ACREE, JUDGE: This is the appeal and cross-appeal of a judgment entered in Scott Circuit Court after a jury found Cincinnati Insurance Company (CIC) liable to George and Kay Hofmeister for fraudulent misrepresentation and for violation of the Kentucky Unfair Claims Settlement Practices Act (UCSPA), Kentucky Revised Statutes (KRS) 304.12–230. CIC appeals the trial court's denial of its motions for summary judgment, motions for directed verdict and judgment notwithstanding the verdict, and entry of judgment awarding the Hofmeisters $10,000,000 in compensatory damages and $18,405,500 in punitive damages following a jury verdict. Prior to appeal, the trial court amended the judgment by reducing the punitive damages award to $10,000,000. The Hofmeisters filed a cross-appeal, challenging the reduction of the punitive damages award. We reverse the judgment and dismiss the Hofmeisters' cross-appeal as moot.

This case requires examination of a myriad of relationships and duties, some created by contract, others by statute, and still others by common law. It

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[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

requires examination of settlement negotiations and litigation strategy and tactics, nearly all of which was placed in the hands of a jury to assess. Understanding this case necessitates a detailed examination of a voluminous record which we will abbreviate wherever possible.

I. Facts and Procedure

The facts of the underlying automobile claim, which the jury found CIC settled unfairly, began at 10:00 a.m. on November 3, 1998. Eugene "Gene" Clark, a delivery driver for Dasher Express, Inc., had finished a workshift that exceeded ten hours. He returned his employer's vehicle to Dasher's offices in Lexington, Kentucky. He then drove home to Frankfort in his personal vehicle.

Clark was fatigued when he arrived home and discovered that he still had in his possession the company's credit card and the keys to his company's vehicle. He called Dasher's offices, informed the dispatcher of his mistake, and "indicated he was going to return the keys to Dasher." (Trial Court's Opinion and Order, September 13, 2002, p.2, quoting testimony of Dasher employee). Clark took a shower and changed clothes. Then he got back in his personal vehicle and left his Frankfort home. Ostensibly, his sole purpose was to return the Dasher vehicle keys and credit card.

George Hofmeister was driving his own vehicle and talking to his wife on a cell phone when he first saw Clark's vehicle approaching him from about a quarter-mile away. Clark's driving was erratic. In fact, Clark had fallen asleep despite having gone to a

McDonald's restaurant for coffee. As the vehicles approached one another, Clark's vehicle crossed the centerline. Hofmeister slammed on his brakes but did not avoid the collision. Whether it was possible to have done so was never determined in the record.[2]

When Clark did not arrive at Dasher's offices after indicating he was going to return the keys, a Dasher employee called his telephone number and

> le[ft] a message for Gene, indicating whether or not he was returning the keys and when they or whomever [sic] was returning the keys would have them to Dasher. After that, we received a call that Gene had been in an accident and basically were waiting to see how he was and, you know, what the situation was.

(Trial Court's Opinion and Order, September 13, 2002, p.2, quoting testimony of Dasher employee).

The accident did not occur on the most direct route between Clark's home and Dasher's offices. Clark said the direct route he regularly took would have placed him on Interstate Highway 64 (I-64) all the way from Frankfort until he exited the highway southbound at the Newtown Pike exit in Lexington. But the accident site was on US 62 in Georgetown, Kentucky. This location necessarily required Clark to exit I-64 about halfway between his home and Dasher's offices, and to head away from his business destination. Clark was

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[2] Mr. Hofmeister testified in the bad faith trial, however, that there was no place for him to exit the road on which the accident occurred.

rendered unconscious by the accident, and said he did not recall exiting I-64 onto US 62 or why he did so.

Hofmeister's injuries were significant. He convalesced for a total of eight months, confined to a wheelchair for five of those months. During that time, Hofmeister engaged attorney Dale Golden to assist in recovering his damages.

Golden concentrated his settlement efforts on Clark and Clark's insurer, the Travelers Insurance Group. Travelers offered to pay Hofmeister its policy limits of $100,000. Pursuant to KRS 304.39-320(3), Golden sent notice of Travelers' offer to Hofmeister's underinsured motorist (UIM) coverage insurer, Kentucky Farm Bureau Mutual Insurance Company, whose policy limits were also $100,000. Farm Bureau elected to preserve its subrogation rights against Clark and substituted its own payment of $100,000 to Hofmeister under the procedure outlined in *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1983). Additionally, Farm Bureau paid $50,000 in personal injury protection (PIP) benefits to Hofmeister's medical providers. Hofmeister did not waive his right to file a civil action against Farm Bureau, and he subsequently did so.

The complaint first named Clark as a defendant. The second defendant identified was Farm Bureau. The claim against Farm Bureau sought to collect an additional $100,000 in UIM benefits available under any and all of the Hofmeisters' policies. Finally, the complaint named Dasher, asserting that Clark was acting within the scope of his employment at the time of the accident and, therefore, Dasher was vicariously liable.

Service of the complaint was Dasher's first notice that the Hofmeisters were asserting any claim against the company. Consistent with duties created by its contract of insurance, Dasher notified CIC of the claim. CIC's duty under the same contract was to provide a defense at its cost. To satisfy that duty, CIC made financial arrangements with attorney Dan Murner to answer and defend Dasher against the Hofmeisters' claims.

Murner drafted and served Dasher's answer to the complaint on November 4, 1999, asserting, among other defenses, that Clark was not acting within the scope of his employment at the time of the accident, and that Hofmeister was comparatively negligent. Murner simultaneously served discovery requests upon Hofmeister seeking information substantiating the damages claimed and the basis of Dasher's alleged liability.

The Hofmeisters responded to Dasher's discovery requests four months later, on March 3, 2000. The responses provided scant information upon which Dasher could assess its exposure to liability. On the contrary, they show the Hofmeisters: (1) had not yet compiled a list of medical expenses; (2) had not yet decided what witnesses to call at trial; (3) did not know what documents they intended to introduce at trial; and (4) were not prepared to identify any expert, including one who would testify regarding Mr. Hofmeister's claim for economic losses, or otherwise. Furthermore, in response to Dasher's request pursuant to Kentucky Rules of Civil Procedure (CR) 8.01(2) that damages be specified, the Hofmeisters replied that "[a] total has not been calculated at this time."

The Hofmeisters, too, engaged in discovery. On February 1, 2000, they submitted interrogatories and requests for production of documents to Dasher. Consistent with a pattern repeated throughout this litigation, the Hofmeisters did not ask Dasher to produce insurance information in accordance with CR 26.02(2).[3]

In the meantime, Dasher noticed Hofmeister's deposition to be taken on May 12, 2000. Mr. Hofmeister's deposition testimony was the first indication Dasher had that Hofmeister was claiming a loss of income equaling or exceeding $5 million. When questioned about substantiation for this loss, Hofmeister explained that the primary entity through which he conducted his business, American Commercial Holdings, Inc. (ACH), had paid him a $5-million bonus for the year of the accident, but did not pay him any bonus the next year.[4]

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[3] CR 26.02(2) states:

> A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

[4] As the CEO of ACH, Mr. Hofmeister largely controlled his own income. He testified that his salary the year after the accident actually increased from $577,402 in 1998 (10 months of which preceded the accident) to $624,135 in 1999. The Hofmeisters' tax returns show that 1998 was a good year for Mr. Hofmeister to take a $5-million bonus because his capital losses and Schedule E losses (from other partnerships and subchapter S corporations including ACH) exceeded $8 million. When those losses were

Hofmeister's deposition testimony showed that while he did receive a Form W-2, he was not a typical employee. He was a self-made entrepreneur. Through various business entities he had created, including ACH, Hofmeister made a career of purchasing troubled businesses, obtaining financing to keep the businesses afloat, and then reselling the businesses for a profit. Between 1995 and 1999, Hofmeister and ACH acquired approximately sixty (60) businesses. Hofmeister stated that he accomplished these acquisitions after obtaining bank financing to do so. At deposition, he testified that he had been turned down for a $25-million loan as a direct result of the accident and his injuries. Consequently, so he testified, he was unable to purchase more distressed businesses for resale. He had no documentation with him at the deposition that would have substantiated any of his prior acquisitions or sales, or any of his business activity at all. Nor could he document the denial of his $25-million loan application or the potential business acquisitions the loan would have facilitated. However, he agreed to later provide

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deducted from his total income, including the $5-million bonus, the Hofmeisters' adjusted gross income (AGI) was less than zero (-$443,102). Consequently, the Hofmeisters paid no taxes in 1998. In 1999, the year after the accident, the Hofmeisters' businesses netted substantial capital gains resulting in an AGI of more than $9.5 million, and a tax liability of more than $1.8 million. Awarding himself any bonus in 1999 would have yielded an even higher tax burden. In 2000, Mr. Hofmeister's salary was again above $500,000. Also in 2000, and in 2001 and 2002 as well, the Hofmeisters continued to earn substantial capital gains. Those gains, however, were offset by greater Schedule E losses from other partnerships and S corporations, including the Hofmeisters' interest in equine partnerships.

Dasher with that documentation through his own attorney.

Hofmeister's attorney, Golden, took the face-to-face opportunity immediately following Hofmeister's deposition to propose settlement. After the Hofmeisters departed, Golden sat down with Murner and Dasher's owners and verbally demanded $1,500,000 on behalf of his clients.[5] According to Murner's uncontradicted testimony, Golden said "[Y]ou don't want an excess verdict, you'd better settle this case." Once Golden had departed, Murner's clients asked him what was meant by an "excess verdict" and Murner explained it to them. What followed this meeting was a series of extrajudicial correspondence upon which much of the Hofmeisters' claim of fraud and bad faith rests.

On May 18, 2000, Murner wrote to Golden requesting further substantiation of Hofmeister's claim that his business losses were attributable to the accident and stating that such information was essential to a proper assessment of Golden's settlement demand. Murner also noted that the demand was "in excess of the policy limits provided by Dasher's insurance carrier[.]" He never stated what those policy limits were except to say that $1,500,000 exceeded them.

On May 22, 2000, Golden wrote to Murner "a little surprised that $1,500,000 is in excess of the policy limits of Dasher's insurance carrier." He declined

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[5] Though Golden informally stated he could establish damages of $20,000,000, no demand higher than $1,500,000 was ever made.

Murner's request for additional support for Hofmeister's losses, stating, "The tax returns I have provided to you contain more than adequate information to show" Hofmeister's loss. He expressed his opinion that a "claim for punitive damages against Dasher alone could exceed $1,000,000." Nevertheless, based upon Murner's representation that $1,500,000 exceeded Dasher's liability policy limits, Golden agreed to recommend to Hofmeister "that he accept the amount of $1,000,000, *which I assume* from your correspondence is the policy limit." (Emphasis supplied).

Because Golden was unable to contact Mr. Hofmeister until early the next month, Golden agreed to extend the offer until June 9. Golden stated that if settlement was not accomplished by then, he would recommend that his client not accept less than $1,500,000. "In other words," Golden said, "assuming that Dasher has $1,000,000 in coverage, this is your one opportunity to resolve this matter within the limits of coverage."

The next day, May 23, 2000, Golden and Murner spoke by telephone. Based on that conversation, Golden wrote Murner again, agreeing to a short extension of the deadline for Dasher's response to his settlement demand. Golden also asked Murner to let him know "what additional information you will need and I will try to provide" it. He then reiterated that if Dasher did not agree to settle the claim for $1 million, "our demand will increase beyond the limits of Dasher's liability policy[.]"

One day later, May 24, 2000, Murner provided a list of information he needed to assess the claim and

settlement demand, limiting the list to information Hofmeister already agreed in his deposition to provide through Golden. Among other things, this included: a list of Hofmeister's companies identifying those he purchased and sold in the previous five years, with the cost of acquisition and profit realized on resale; documentation relating to the denial of his $25-million loan application; quarterly earnings reports for three of Hofmeister's corporations; and an accounting of Hofmeister's 1999 income.

On May 26, 2000, while waiting for Golden's response, Murner sought to file a protective cross-claim against Clark. On behalf of Dasher, Murner continued to assert that Clark was not acting within the scope of his employment at the time of the accident, but claimed the right of indemnification from Clark should that issue be determined otherwise. The Hofmeisters initially objected to Dasher's motion to file the cross-claim, but soon after withdrew the objection.

On May 31, 2000, the Hofmeisters served upon Dasher a second set of interrogatories and requests for production of documents. Despite Golden's being "a little surprised" that the initial demand exceeded policy limits, the discovery still did not include a request to provide insurance information.

Also on May 31, 2000, Golden wrote to Murner again. He enclosed a copy of an amended complaint alleging that Dasher had violated federal Department of Transportation regulations prohibiting drivers to spend more than ten consecutive hours on the road without an eight-hour break. Based on that alleged violation, the proposed amended complaint demanded punitive damages be assessed against Dasher. Golden

stated he would file the amended complaint if the case was not settled by June 22 for $1,000,000.

Golden's correspondence did not provide the documentation Murner requested, but did say that he had sought it from "Mr. Hofmeister and he will be providing that information to my office within the next few days." Golden also confirmed for Murner that Mr. Hofmeister agreed "to lower his demand to $1,000,000, which, according to you, is the policy limit of Dasher's insurance." Nothing in the record supports Golden's assertion that Murner had confirmed what Golden had previously assumed – that the limit of Dasher's automobile liability insurance policy was $1,000,000.

On the contrary, according to Murner's testimony, a telephone conversation took place around this time during which he conveyed to Golden the information regarding Dasher's policy of excess insurance coverage. Murner initially told Golden, as he had been told by Dasher, that those policy limits were $3 million. Later, Murner learned that the policy limits were not $3 million, but $5 million. Following a hearing on a procedural motion in Scott Circuit Court, Murner conveyed that corrected information to Golden. There is no evidence in the record that impugns Murner's testimony.

Back at CIC's offices, senior claims examiner Julie Sullivan was developing a sense of the claim against CIC's insured, Dasher. Her role was to evaluate the claim based on information provided by Dasher's counsel. On June 9, 2000, she created a "Reserve Increase Memorandum," introduced at trial as Plaintiffs' Exhibit 5, stating:

> Information is sketchy at this time. . . . The claimant, George Hofmeister, DOB unknown, was in a wheel chair for five months and he had physical therapy. He was unable to conduct his business [but] is back to work now. His attorneys say he will likely need to have a joint replacement of his knee and hip. . . . His meds total around $100,000.

Hofmeister's economic circumstances, as well as a settlement demand in excess of Dasher's insurance coverage through CIC, also concerned Sullivan.

> Mr. Hofmeister is literally "worth millions." We have his tax returns [showing he did not receive a $5M bonus] which plaintiff may attribute to this accident. Dan [Murner] will meet with an accountant to review all this documentation. . . .
>
> In mid May a settlement demand of $1.5 million was initially proposed in the presence of Dasher officials. They immediately became very concerned due to personal exposure. . . . At that time, the issue of accepting the demand and tendering our limit of $1M, limiting the personal exposure of the insured to half a million versus potentially exposing them to millions was problematic due to coverage issues involved.

The coverage issues to which she referred included the fact that "Clark's personal carrier, KY Farm Bureau, tendered their $100,000 limits [and] some question regarding KY Farm Bureau stacking their coverage up to $600,000." Sullivan noted that "while the insured [Dasher] has an umbrella policy, it is not through

CIC." This is the earliest indication in the record that a policy of excess insurance coverage existed. Still, neither the carrier nor the policy limits was identified.

On the other hand, Sullivan noted that there was still a question of Dasher's liability. The case had not developed far enough to know "whether Mr. Clark was on or off the clock." At that time, legal focus was on whether the "actions of Mr. Clark occurred outside the time restrictions of his employment."

As it turned out, Hofmeister's representations of his impaired physical condition were overstated. According to his pretrial disclosures in the spring of 2004, Hofmeister's medical expenses never totaled more than $50,037.92, far from the $[illegible]00,000 to which he had testified. Also, Hofmeister never needed subsequent surgery or any other substantial medical treatment for his injuries. His pretrial disclosures placed a zero-dollar value on future medical costs. Nevertheless, for a time at least, the parties proceeded on Hofmeister's erroneous representations.

Meanwhile, the Hofmeisters, through Golden, had provided to Murner some documentation of Hofmeister's finances. However, according to a June 16, 2000, letter from Murner to Golden, there was still much requested documentation that had yet to be provided. Notably, there was no documentation of the $25-million loan application or its denial. An accounting expert hired on behalf of Dasher reported to Murner that the information Hofmeister had thus far provided only supported the conclusion that his businesses were losing money even before the accident. From 1995 to 1999, the cost of acquiring the businesses exceeded the cash generated by all of

Hofmeister's businesses by $150 million. Dasher's expert could not reconcile Hofmeister's claim that his economic loss was attributable to the accident without additional documentation. He specifically requested documentation to support Hofmeister's income calculations, as well as records of intercompany loans and other subsidization of the losses shown to have been sustained by Hofmeister's equine-related and other businesses. Murner explained to Golden the reason such detailed information was necessary:

> As you know, this is not a W2 economic loss case. Your client derives his income from a myriad of sources, which we need to explore. If this cannot be accomplished by June 22 [Golden's settlement demand deadline], so be it. However, my client will not act on blind faith as you suggest. . . . [I]f you take out the economic claims and simply size this case up on medical expenses (past and future) and pain and suffering (past and future) the numbers do not come close to the limits of my client's insurance policy. For example, everything you have provided to us show [sic] medical expenses of approximately $50,000 rather than the $100,000 claimed by your client during deposition. . . . Your client is asking . . . me to assume without documentation that his economic losses make up the difference and exceed the policy limits . . . .
>
> I, of course, will put all of this in a formal request for production of documents. However, the deadline for your response [to that discovery request] will fall after the deadline your client

has arbitrarily imposed [to respond to the settlement offer].

Golden responded to Murner on June 20, 2000, that "Cincinnati Insurance Company has known about the claim since October 1999. . . . A cursory review of any of Mr. Hofmeister's tax returns for the past five years would reveal to the layman that he has a solid basis for his economic damages claim." Golden declined to send Murner any further medical records to support a claim for future medical costs stating simply that "Cincinnati Insurance Company is creating additional requests for information to serve as the basis for its refusal to settle this claim."[6] Furthermore, Golden charged CIC with failing to timely investigate and pay the claim, and with asking "for more information than the court would ever require Mr. Hofmeister to produce and that would take us several months to acquire." He then stated his intention "to hold Cincinnati Insurance Company responsible."

On June 21, 2000, Murner spoke by telephone with Golden and invited him to his office to discuss settlement. Golden declined the invitation. Murner therefore had a settlement proposal hand-delivered to Golden's office on June 22, 2000. There were several aspects to the settlement proposal.

First, because the issue of whether Clark was acting within the scope of his employment at the time of the accident had not been resolved, Murner pointed out the possibility that Dasher would have no liability

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[6] The record reflects that no such medical records existed and, therefore, none could be sent.

whatsoever. Additionally, Murner's interpretation of the discovery produced thus far suggested some comparative liability on Mr. Hofmeister's part.

Second, because Hofmeister still had not provided the documentation Murner requested, both informally and through discovery, Hofmeister's claim for lost business earnings could not be properly assessed. Therefore, the settlement offer specifically reserved Hofmeister's right to pursue "any claim the Hofmeisters may have against Dasher for damages due to lost wages, or lost profits due to lost business opportunities[.]"

Third, Murner totaled "all of Mr. Hofmeister's medical expenses provided to Dasher by Plaintiffs' counsel to date," then subtracted "expenses previously paid for PIP [personal injury protection of $50,000]" by Hofmeister's own insurance. The balance was $9,275.[7] Dasher agreed to pay that sum and further agreed, having obtained CIC's consent, that CIC would "be responsible for negotiating any settlement for PIP, for expenses incurred as of the date of this settlement."

Fourth, Dasher agreed to pay Hofmeister $25,000 for future medical treatment despite the fact that "no medical evidence has been presented by the Hofmeisters' counsel regarding Mr. Hofmeister's need for future medical treatment[.]"

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[7] These figures indicate that Murner continued to err in favor of Hofmeister regarding calculation of medical expenses since his estimate exceeds Hofmeister's pretrial disclosure by more than $9,200.

Fifth, recognizing Mrs. Hofmeister's "role in caring for Mr. Hofmeister[,]" Dasher agreed to pay her $25,000 on her loss of consortium claim.

Sixth, for Hofmeister's claim of past and future pain and suffering, Dasher agreed to add $50,000 to the $100,000 previously received from Clark's carrier making his pain and suffering claim about three times his medical expenses.

In effect, Dasher's total offer was $109,275, plus indemnification for the $150,000 previously paid by other insurers for a total of $259,275, plus the important reservation of Hofmeister's right to pursue his claim for lost income.

Before the workday ended, Golden, on behalf of the Hofmeisters, wrote to Murner stating that the "proposed settlement offer is rejected and that we hereby withdraw our offer to settle this matter for the policy limits of $1 million." Golden gave no credence to Murner's asserted defense that Clark was not acting in the scope of employment for Dasher, stating, "I have already presented to your office the applicable case law that clearly indicates Mr. Clark was acting within the scope of his employment[,]" and insisting that taking a contrary position "is a clear violation of the Unfair Claims Settlement Practices Act because liability has become clear." Similarly, according to Golden, Murner's position that Hofmeister might bear some percentage of fault "constitutes a violation of the Unfair Claims Settlement Practices Act." Finally, and contrary to the offer to reserve the claim for lost profits, Golden claimed that while Murner acknowledged a "viable claim for lost wages, lost profits, and lost business opportunities, [he] did not

offer a dime to settle that portion of our claim. This, too, is in violation of the Unfair Claims Settlement Practices Act."

Settlement negotiations were thus suspended. Negotiations would not resume in earnest until the issue of Dasher's vicarious liability was determined by the trial court. This did not occur until shortly before the final date set for the trial, October 14, 2002.

Between these two periods of settlement negotiation – the summer of 2000 and autumn of 2002 – substantial discovery took place as well as a variety of procedural and other motions. The following events, including extrajudicial events subsequently memorialized as part of the record, are relevant to our review.

On February 9, 2001, Golden wrote a peculiar letter[8] to Murner ostensibly attempting to settle one portion only of his clients' claims. The letter did not present any *offer* to settle. On the contrary, Golden was attempting to resurrect and accept one portion of Dasher's June 22, 2000, offer that Hofmeister rejected *in toto* eight months earlier. With still no proof of future medical expenses, Golden, on behalf of the Hofmeisters, wanted now to accept that portion of Dasher's previous offer. He wanted Murner to explain the "decision to withdraw the offer of settlement of $25,000[.]" He also wanted to know why Hofmeister

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[8] The oddity of Golden's letter surpasses the "curious letter" described in *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 495 (Ky. 1976), which is similar to some of Golden's other correspondence.

could not accept one portion of the offer without accepting the other portions. In Golden's opinion, this violated Kentucky's UCSPA. Using the same wording as KRS 304.12-230(13), Golden claimed this amounted to "failing to promptly settle a claim where liability has become reasonably clear under one portion of the insurance policy coverage in order to influence settlement under another portion of the coverage afforded by [CIC]."

Murner replied on February 15, 2001, documenting the history of Dasher's offer and Hofmeisters' rejection, and quoting Golden's June 2000 pronouncement that "[w]e will now proceed to trial and have the jury decide the issue of damages." Again, Murner insisted that liability was not as clear as Golden asserted and reminded Golden of the difficulty Dasher had in obtaining from Hofmeister sufficient information to assess his claim of lost profits. Finally, Murner stated, "I believe your allegations of bad faith that you have thrown about throughout this litigation are frivolous."

More than three years later, when Golden interrogated Murner at trial regarding this episode, Golden revealed that his February 9, 2001, letter was a calculated attempt to put Murner "on the spot."[9]

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[9] On this point, Golden interrogated Murner, CIC representative Dan Walsh, and CIC's bad faith expert Carl Sumner. The essence of Golden's interrogation and argument is that: (1) the June 22, 2000, offer included $25,000 for future medical expenses; (2) there was no change in the medical proof between June 22, 2000, and February 9, 2001, when Golden "accepted" the offer, so the offer could not have become less justifiable; (3) despite this, CIC refused to pay over the $25,000; (4) Murner admitted that the $25,000-offer should not have been made, and (5) Murner's

Golden: You admitted you shouldn't have made that offer. You admitted it was a sham. . . . I put you on the spot on the $25,000 you offered in future medicals, to show that that was just a sham.

Murner: I did not admit it was a sham. . . . You rejected the whole $109,000 . . . . And then six [sic] months later you said, oh well, I'll take the $25,000 that you were offering for medicals, and I said you already rejected the offer and you hadn't proved anything regarding future medicals, so why would I go there?

The Hofmeisters continued to engage in discovery between the summer of 2000 and autumn of 2002. They served additional requests for production of documents and a third and fourth set of interrogatories on Dasher in September 2000 and May 2001, respectively. Again, the Hofmeisters never took advantage of the discovery process to obtain information regarding Dasher's insurance coverage.

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admission supported Golden's claim that it was a sham offer all along and, therefore, made in bad faith. This argument fails fundamentally since there was never any evidence of the need for future medical care. Murner's settlement recommendation to Dasher, and CIC's approval of the settlement offer for future medicals, was based on Golden's representation that he would eventually present such evidence. Golden attempts to make Murner and CIC the culprits because they relied on his representations in making the offer. The argument defies logic.

Dasher, too, continued efforts through discovery to obtain Hofmeister's financial records so it could assess whether there was a causal relationship between the accident and Hofmeister's business failures. The trial court permitted such discovery even over Golden's motion for a protective order. Even then, Dasher subsequently found it necessary to obtain the trial court's order compelling production of this documentation before Hofmeister would produce it.

On July 19, 2001, through Golden, the Hofmeisters moved to amend their complaint for a second time. They did not attach a copy of the proposed amended complaint to the motion, but stated their intent to assert a claim against CIC for violation of the UCSPA. Through Murner, Dasher moved the trial court pursuant to CR 11 to strike the motion as frivolous, having been filed for the improper purpose of attempting to force settlement of the underlying claim. Primarily, Dasher noted that its liability was still fairly debatable since no decision had yet addressed the scope-of-employment issue. Dasher also asserted that the Hofmeisters had continuously thwarted its efforts to substantiate their economic losses. The trial court granted the Hofmeisters' motion to amend the complaint and deferred a ruling on Dasher's CR 11 motion.

The second amended complaint listed a variety of grievances against CIC, each of which the Hofmeisters contended constituted a violation of the UCSPA. Shortly thereafter, the Hofmeisters amended the complaint again, adding an additional UCSPA claim against CIC. Now itself a defendant, CIC answered the two amended complaints and denied each of the substantive allegations in both.

In September 2001, the trial court agreed with CIC that the case against it for bad faith should be bifurcated from the underlying tort claim and entered an order to that effect. Attorney Michael Risley entered his appearance on behalf of CIC. The underlying tort claim went forward.

On March 15, 2002, Dasher took the deposition of a representative of the bank where Hofmeister had applied for and had been denied the $25-million loan. The bank representative acknowledged that he recommended Hofmeister's loan application to his superiors, but stated they ultimately denied the loan. He said that Hofmeister's medical condition following the accident did not affect either his recommendation or his superiors' denial of the application for credit. He testified, "I don't recall it being woven into the credit presentation as an issue we had to deal with[.]" Instead, "the final decision" to reject was based on "economic issues with his businesses, his horse business and other businesses, that he had that brought in risk factors that the bank [was] not willing to accept[.]" Nothing in the record indicates that the accident had any effect on the bank's denial of Hofmeister's application for a $25-million loan.

Trial was scheduled for the spring of 2002. Both the Hofmeisters and Dasher submitted proposed jury instructions that left the issues of Dasher's vicarious liability and Hofmeister's comparative negligence for resolution by the jury. For reasons which the Hofmeisters opposed but are not otherwise pertinent here, the trial was continued and eventually rescheduled for October 14, 2002.

The critical issue of whether Clark was acting in the scope of his employment was still not resolved when, between August 30 and September 4, 2002, the Hofmeisters, Clark and Dasher each filed motions on this issue. On September 13, 2002, the trial court entered an order finding that Clark was acting in the scope of his employment with Dasher.

There was conflicting evidence as to whether Dasher's dispatcher *ordered* Clark to return the keys and credit card himself that morning, or whether Clark, knowing the keys had to be returned, felt compelled to voluntarily undertake the task. The Hofmeisters argued that this specific question is irrelevant. The trial court seemed to agree, focusing instead on the facts that: (1) Dasher "indicated the keys had to be returned;" (2) return of the keys was for Dasher's benefit; (3) Dasher's dispatcher authorized the return of the keys; and (4) returning the keys was "incidental" to Clark's employment. The trial court noted and discounted the fact that Clark made two separate stops for coffee and fuel, stating those stops were "not evidence of any independent pursuit or deviation [but] merely in furtherance of Clark's primary mission[.]" The trial court did not address the facts that: (1) Clark was not on a direct route between his home and Dasher's offices when the accident occurred; (2) Clark did not recall why he deviated from the direct route to Dasher's offices; (3) Clark himself had created the circumstances necessitating a return of the keys and credit card; or (4) when asked in a pre-litigation interview whether he was on company or personal business, Clark himself responded, "[T]hat's debatable."

On October 3, 2002, rather than challenging the trial court's ruling, Dasher stipulated liability[10] and simultaneously presented the Hofmeisters with an offer of judgment, pursuant to CR 68, in the amount of $175,000.[11] Eight days later, on October 11, the offer increased to $300,000. On the day of trial, October 14, Dasher offered $500,000. Before trial started, Dasher offered the $1,000,000-limits of its policy of automobile liability insurance. On behalf of the Hofmeisters, Golden accepted, but conditioned that acceptance upon certain concessions from some of the other defendants.

Because this occurred on the day trial was to commence, and because terms of the settlement were unclear, the parties agreed to go on the record with the trial court, as "the way to consummate this settlement[,]" to use Golden's words. Golden and Murner were present on behalf of their respective clients. Also present, either in person or by telephone conferencing, were representatives of Clark's personal insurer and the attorney for Farm Bureau Insurance. As the case against CIC for statutory bad faith had been bifurcated and all such claims were to be

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[10] Murner testified this was a tactical decision "to refocus the issues to the damages, which is what we always wanted to address in this case." On cross-examination, Golden attempted unsuccessfully to have Murner admit the stipulation indicated CIC knew Dasher was liable all along "because nothing had changed in the case" from the date of Dasher's original offer, June 22, 2000, until liability was conceded.

[11] The Hofmeisters have argued throughout the litigation, and now in this appeal, that the net value of this $175,000-offer was $25,000 because of "liens" in favor of Travelers and Farm Bureau. There is nothing in the record supporting the existence of such liens.

addressed later, attorney Risley was not present on behalf of CIC.

Golden initiated the discussion by representing he could "blackboard over $20 million in damages and that will expose Eugene Clark to that excess judgment[.]" Only moments into the hearing, a reference was made to the "excess policy with Dasher of $10 million[.]" Murner corrected the speaker and clarified that Dasher's excess policy was only $5 million. Owing to telecommunications glitches, Murner had to repeat three times that the amount of Dasher's excess insurance coverage was $5 million.

Before the negotiations ended, eleven separate references were made to the existence of Dasher's policy of excess insurance. In addition, the excess insurer was identified as Fireman's Fund three separate times. And the excess policy limits of $5 million were stated a total of four times. Nothing in the transcript indicates that anyone, including Golden, was surprised by or unaware of the existence of Dasher's policy of excess insurance.

The sticking point in settlement, however, was the relatively smaller amount of $100,000. This is one of the sums of insurance Golden collected for the Hofmeisters before initiating litigation. Before the parties could reach a settlement, one question had to be resolved: which party or insurance company would ultimately be responsible for that amount? The attorneys for the Hofmeisters and Dasher and Clark were attempting to convince the representatives of the insurance companies to waive the right to recover the sum from any of them.

Golden pointed out that he could easily prove more than $100,000 in damages and, if the trial went forward, the obstinacy of Clark's personal liability insurer "will expose Eugene Clark to that excess judgment." This prompted Clark's insurer to ask, "Isn't Mr. Clark an insured under the excess policy, also?" To this, Murner responded that he "had no authority from the excess carrier. A million dollars is what we're offering here." Golden proposed a simple solution: "[I]f [Clark's personal liability insurer] pays the hundred [thousand dollars] that it already committed to pay earlier, then we're all done and it's over with, we can all go home."

Clark's insurer balked. So, Golden announced he was prepared "to proceed against Eugene Clark, and if we ring him up, then we're going to take his personal assets . . . and our position is going to be that [Clark's personal liability insurer] has acted unreasonably and violated the Unfair Claims Settlement Practices Act[.]" Eventually, the representatives of the affected insurers agreed to brief and argue this particular issue among themselves, leaving the remaining parties out of that particular fray and free to settle their claims.

On the points of settlement, Murner was very clear that the settlement for the limits of Dasher's automobile liability policy embraced a universal release of liability relative to the underlying tort claim.

> Mr. Murner: Okay, Your Honor, my position is—and if I'm wrong, somebody tell me now. Cincinnati, excess carrier, Dasher and Clark are protected, and free and clear from—

The Court: I don't know what anybody else thinks, but I am clear on that, for whatever it is worth.

. . . .

Mr. Murner: What I want to make sure is that this is a complete release. I mean, this is the standard complete release with the exception of [the remaining issues among the insurers regarding subrogation issues apart from the parties].

Mr. Golden: I agree.

In accordance with this agreement, Murner drafted a settlement agreement and release.[12] The Hofmeisters' right was reserved to continue pursuing the bad faith and UCSPA claims against CIC and Fireman's Fund. Otherwise, the Hofmeisters released Dasher, Clark, CIC and Fireman's Fund for all claims arising directly from the automobile accident only.

There was a delay in obtaining approval from the Hofmeisters' insurer and Clark's personal insurer relative to the subrogation issue. This delayed execution of settlement documents and disbursement of proceeds. Attempting to encourage movement on the issue, Golden filed a motion to enforce the settlement on behalf of the Hofmeisters, followed by a

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[12] Golden actually made the first attempt at drafting the agreement. However, that draft was incomplete in that it did not include the release of CIC and Fireman's Fund as to the underlying tort claim and it left unresolved the subrogation dispute between the Hofmeisters' insurer and Clark's insurer.

motion on his own behalf, based on his own lien, for immediate disbursement of his attorney fees and costs expended.

In his motions, Golden claimed that he never agreed to include CIC and Fireman's Fund in the release of the underlying tort action. Blaming Murner, Golden insisted that the trial court "stop the wrongful conduct of withholding the settlement proceeds in exchange for additional releases that were never bargained for[.]" Golden insisted the delay was to pressure the Hofmeisters into dismissing their bad faith claims.

On behalf of Dasher and Clark, Murner responded that he had

> never included a provision in any proposed settlement agreement providing for protection against allegations of violation of the Unfair Claims Settlement Practices Act [or] in any correspondence that any release must contain protection from any potential bad faith allegations[.] Thus, any claim by Plaintiffs' counsel that settlement proceeds are being withheld to solicit a release of bad faith claims on behalf of Cincinnati Insurance and/or Fireman's Fund Insurance Company are simply unsupported by the correspondence between counsel and the proposed settlement release.

Murner's position is easily verified by the language of the settlement agreement itself. Furthermore, nothing in the record contradicts Murner's position on this issue, nor does the record support Golden's suggestion otherwise.

Eventually, all of the issues were resolved by the attorneys without the need for the trial court to rule. However, the delay was long enough that it allowed Allied Capital Corporation, one of George Hofmeister's judgment creditors, to intervene in this action and garnish the settlement proceeds before the Hofmeisters received them.

In May 2003, the Hofmeisters sought leave to file another amended complaint. In essence, this amendment added two counts. First, the Hofmeisters alleged that CIC's rapid increase in offers between October 3 and October 14, 2002, from $175,000 to $1,000,000, violated Kentucky's UCSPA. Second, they alleged that CIC intentionally prolonged settlement to purposefully take advantage of the Hofmeisters' worsening financial circumstances. The motion was granted and the amended complaint ordered filed on June 5, 2003.

In August 2003, ten months after the settlement negotiations were recorded before the trial court, it occurred to the Hofmeisters that they had an opportunity to file yet another amended complaint. Here, they alleged that CIC "misrepresented pertinent facts regarding the amount of insurance that was available" and "failed to disclose the existence of an excess insurance policy." The motion was granted and the amended complaint ordered filed on September 15, 2003.

In February 2004, the Hofmeisters sought leave to file what became their final amended complaint. Seemingly aware of this Court's nonfinal opinion in *Knotts v. Zurich Ins. Co.*, 2002-CA-001846 (Feb. 6, 2004) that no post-litigation conduct by an insurance

company can be the basis of a UCSPA claim, the Hofmeisters' "Fifth Amended Complaint"[13] alleged that all of CIC's actions also supported a claim for common law fraud and intentional infliction of emotional distress. It appears from the record that this tactical decision was intended to avoid the potential that *Knotts*, once final, would totally defeat the Hofmeisters' claims under the UCSPA. The motion was granted and the amended complaint ordered filed on May 17, 2004, three days before trial.

Before trial commenced on May 20, 2004, CIC moved for a continuance because the amended complaint had been filed so close in time to the commencement of trial. The motion was denied because there were no additional factual allegations, only additional legal theories. The trial judge also addressed numerous procedural and evidentiary motions, filed by both sides. Over CIC's objection, the trial court ruled that Murner was CIC's agent for purposes of settlement negotiation. *See, infra*, Section II.C.

Both sides tendered proposed jury instructions. The parties announced ready and the trial proceeded. At the close of evidence, each party moved for directed verdicts. As to the issues now before this Court, those motions were denied. The jury was instructed in preparation for its deliberations.

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[13] While this was the fifth amendment of the complaint after CIC was named as a defendant, it was the sixth time the original complaint was amended.

The trial court took the parties' respective proposed jury instructions into consideration but crafted its own. The court incorporated its previous holding that Murner was CIC's agent into Instruction No. 2, addressing violations of the UCSPA, and Instruction No. 3, addressing fraudulent misrepresentation. Therefore, the jury was entitled to attribute Murner's conduct to CIC for liability purposes. The jury received no instruction regarding fraud by omission, *i.e.*, the Hofmeisters' allegation that CIC failed to disclose the existence of the policy of excess insurance coverage. Further details of the jury instructions will be discussed as necessary in the context of the parties' various arguments. The case was turned over to the jury which found for the Hofmeisters on both Instruction No. 2 and Instruction No. 3, though not unanimously on either.

CIC filed motions for judgment notwithstanding the verdict; for a new trial; and to alter, amend or vacate the judgment. To the extent the bases for these motions are relevant to this appeal, they will be discussed *infra*. It is sufficient now to note only that all post-judgment motions were denied with the exception of the motion to reduce the punitive damages award. These appeals followed.

II. *Cincinnati Insurance Company v. Hofmeister*, 2004-CA-002296

CIC presents a plethora of arguments on appeal. Many of these arguments center on one central question: What legal relationship exists between an insurer and legal counsel hired to defend its insured? Surprisingly, Kentucky has never addressed this question squarely, but the answer is crucial to

resolution of this case. After addressing this question generally, we will apply the law to the facts of this case, and then address CIC's additional arguments *seriatim*.

We further preface our discussion by noting two factors that will distinguish this case from many others. First, the underlying litigation was a negligence action brought by a claimant seeking restitution from a tortfeasor. It was not a contract action brought either by the first-party insured, by a third-party beneficiary of an insurance contract, or a third party who stood in the shoes of the insured as a result of an assignment. Second, the Hofmeisters made no attempt to settle the case with Dasher prior to the filing of the complaint. Consequently, whether the concepts discussed here have equal application to pre-litigation conduct will depend on circumstances not present in this case.

A. Standard of Review

Many of the issues addressed here were preserved in more ways than one. The issues which are dispositive of this case involve the denial of CIC's motions for directed verdict and for judgment notwithstanding the verdict. The same standard applies to both. *Prichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky.App. 1987). A directed verdict or judgment notwithstanding the verdict is appropriate when, drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict. *Buchholtz v. Dugan*, 977 S.W.2d 24, 26 (Ky.App. 1998); *see also, Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). A reviewing court may not disturb a trial court's decision

on a motion for directed verdict unless that decision is clearly erroneous. *Bierman* at 18. The denial of a directed verdict by a trial court should only be reversed on appeal when it is shown that the verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice. *Id.* at 18-19.

B. Relationship of Attorney Defending Insured and Insurer – Generally

In Kentucky, the relationship of the insurer to the attorney hired to defend the insured has been discussed primarily in caselaw interpreting the Rules of Professional Conduct, Supreme Court Rule (SCR) 3.130. While the trial court was not inclined to consider these cases because Murner's professional responsibility was not directly in issue, we believe they are illuminating.

In *American Ins. Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996), the insurance industry sought permission for its insurer members to use in-house lawyers to defend their insureds, or at least to engage outside counsel on a "set fee" or retainer basis to handle all litigation. Both requests were denied.

Reaffirming the sanctity of the relationship between the insured and the attorney hired to defend him, our Supreme Court reemphasized that "[n]o man can serve two masters[.]" *American Ins. Ass'n* at 571, *quoting Kentucky State Fair Bd. v. Fowler*, 310 Ky. 607, 615, 221 S.W.2d 435, 439 (1949). It is axiomatic that a lawyer must serve his client dutifully and loyally. Building upon that axiom, the Supreme Court recognized that granting the industry's request would

move the attorney closer to certain "inherent pitfalls and conflicts" that would interfere with his duty and loyalty to the client. *Id.* at 571.

> Inherent in all of these potential conflicts is the fear that the entity paying the attorney, the insurer, and not the one to whom the attorney is obligated to defend, the insured, is *controlling* the legal representation.

American Ins. Ass'n at 573 (emphasis supplied). To quell that "fear," "[w]e continue to adhere to the view that it would be contrary to public policy to allow the insurer to control the litigation[.]" *Wheeler v. Creekmore*, 469 S.W.2d 559, 563 (Ky. 1971).

American Ins. Ass'n was not the first time we rejected a "rule [that] would be inimical to the preservation of traditional and longstanding concepts associated with attorney-client relationship, as recognized by Kentucky law." *American Continental Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12, 13 (Ky.App. 1998) (rejecting excess insurer's claim of right to sue its insured's attorney for malpractice). Our courts simply cannot ignore Kentucky's consistent refusal to allow the insurer any right to control the attorney's independent manner of representing its insured. That independence has a long history.

In *New Independent Tobacco Warehouse, No. 3 v. Latham*, 282 S.W.2d 846 (Ky. 1955), our highest court said that the "general rule is the services of a professional man, such as a lawyer . . . are rendered under an independent contract[.]" *Id.* at 848. That is, a lawyer is one "who follows [his] employer's desires only as to results of work, and not as to means

whereby it is to be accomplished." *Romero v. Administrative Office of Courts*, 157 S.W.3d 638, 642 (Ky. 2005), *quoting* BLACK'S LAW DICTIONARY 770 (6th ed. 1990). These same rules apply when an insurer selects and pays an attorney to represent its insured. The Tennessee Supreme Court accurately described the relationship:

> In the typical situation in which an insurer hires an attorney to defend an insured, the relationship of the insurer and its attorney is precisely that of principal to independent contractor. [T]he attorney is engaged in the distinct occupation of practicing law . . . one in which the attorney possesses special skill and expertise. [T]he attorney generally supplies his or her place of work and tools; the attorney is employed and paid only for the cases of individual insureds; and he or she alone, consistent with ethical obligations to ensure competence and diligence in the representation, determines the time to be devoted to each case. Finally, and obviously, the practice of law is not, nor could it be, part of the regular business of an insurer.

Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 393-94 (Tenn. 2002); *see also, Sam Horne Motor & Implement Co. v. Gregg*, 279 S.W.2d 755, 756-57 (Ky. 1955)(factors for determining independent contractor status); *see also, Vires v. Dawkins Log & Mill Co.*, 240 Ky. 550, 42 S.W.2d 721, 722 (Ky. 1931)("independent contractor is . . . independent of his employer in the execution of his work, and may labor at the times and in the manner he prefers.").

Clearly, the factor most critical to the attorney's retention of his status as an independent contractor, *vis-à-vis* the insurer, is the attorney's retention of control over the means by which he accomplishes the insurer's desired result – defense of its insured. *Home Ins. Co. v. Henderson Lodge, No. 732, Loyal Order of Moose*, 201 Ky. 522, 257 S.W. 422, 423 (Ky. 1923)("If [one] is merely subject to the control or direction of the [employer] as to the result to be obtained, he is [still] an independent contractor. If [one] is subject to the control of the employer as to the means, he is not an independent contractor.")(quotation marks and citation omitted). We conclude that the relationship of an attorney hired to defend an insured relative to the insurer that hired him, at least initially, is that of independent contractor.[14]

As a general rule, an employer is not liable for the torts of an independent contractor in the performance of his job. *Miles Farm Supply v. Ellis*, 878 S.W.2d 803, 804 (Ky.App. 1994). While general rules often have philosophical or logical origins, their exceptions typically are born of practical realities. Therefore, we cannot ignore the practical reality that an insurer may

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[14] This same conclusion has been reached by many of our sister states. *See, Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 788 N.E.2d 522, 539-41 (Mass. 2003)(Where lawyer "controls the strategy, conduct, and daily details of the defense . . . an insurer cannot be vicariously liable for the lawyer's negligence."), *and cases cited therein, and, Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co.*, 963 F.Supp. 452, 454-55 (M.D.Pa. 1997)("The attorney's ethical obligations to his or her client, the insured, prevent the insurer from exercising the degree of control necessary to justify the imposition of vicarious liability"), *and cases cited therein*.

seek to exercise actual control of an attorney's work, even though lacking the right to do so. Our common law embraces that possibility.

Long ago, Kentucky recognized that if a principal lacking the right of control nevertheless "personally interferes with, undertakes to do, manage or control the work of the independent contractor, he thereby destroys the relationship of independent contractor." *Madisonville, H. & E.R. Co. v. Owen,* 147 Ky. 1, 143 S.W. 421, 424 (Ky. 1912). The independent contractor would thus convert to an employee or agent. Our review of authority reveals that Kentucky independent contractors, once possessed of the right to control their own work, are not inclined to relinquish that right to the employer. In fact, we failed to discover any case in which that has occurred.[15]

However low the rate at which typical independent contractors relinquish the *right* to control their own work, logic compels the conclusion that the rate would be even lower when that right is coupled with a *duty*. Unlike other independent contractors, the attorney who relinquishes the right to control will perforce violate his duty under the Rules of Professional Conduct, Rule 1.8(f)(2), and "clearly subject himself to severe discipline." *Summit v. Mudd,* 679 S.W.2d 225, 226 (Ky. 1984). An attorney's maintenance and

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[15] Several cases, notably *United Engineers & Constructors, Inc. v. Branham,* 550 S.W.2d 540 (Ky. 1977), reaffirm the longstanding rule that "the main dispositive criterion is whether it is understood that the alleged principal or master has the *right* to control the details of the work." *Id.* at 543 (emphasis supplied). Here we are speaking of a different concept – the principal's exercise of control despite having no right to do so.

protection of his independent contractor status is thus additionally reinforced. We therefore agree with our sister court that "cases in which an insurer may be held liable under an agency theory will be rare indeed." *Givens* at 395.

We also believe *Givens* indicates the proper standard for determining whether the insurer has exercised actual control of the attorney despite lacking the right to do so. Such control must be invidious in that it "affect[s] the attorney's independent professional judgment . . . interfere[s] with the attorney's unqualified duty of loyalty to the insured, or . . . present[s] a reasonable possibility of advancing an interest that would differ from that of the insured." *Givens* at 695.

We now apply these criteria to the facts of this case.

C. Whether the Trial Court Erred in Failing to Direct a Verdict That Murner Was Not CIC's Agent

The trial court concluded that Murner was CIC's agent for purposes of settlement negotiations. CIC claims that ruling was error. We agree.

The trial court did not engage in the analysis indicated above, but instead applied the reciprocal analysis of whether Murner was CIC's agent. Whereas independent contractor status is shown by the *absence* of the principal's control over the work to be performed, agency is shown by its *presence*. Just as with the independent contractor analysis, "the right to control is considered the most critical element in determining whether an agency relationship exists."

Phelps v. Louisville Water Co., 103 S.W.3d 46, 50 (Ky. 2003)(citation and quotation marks omitted). Therefore, the trial court's analytical approach was effectively the same as ours.

During oral argument of the issue, the trial court stated, "[I]t's pretty clear to me that Mr. Murner was *controlled and guided* by Cincinnati Insurance Company in terms of settling this case." (Emphasis supplied). The trial court determined that CIC exercised sufficient control over Murner to make him CIC's agent based on the following three facts alone:

(1) "Murner was hired by Defendant [CIC] to represent Dasher;"

(2) "Murner was required to report to [CIC];" and

(3) CIC "would have to approve any settlement offers [recommended by Murner]."

Having examined the record and finding no additional facts that would reinforce this list, we conclude that CIC was entitled to a directed verdict that Murner was not CIC's agent.

Respectfully, we believe the learned trial judge erred by not considering closely enough just what caused these three facts to occur. The trial court concluded they occurred because an agency relationship existed between Murner and CIC. But the record reveals that none of these three facts was intended as a means by which CIC would exercise control over Murner as its agent. Instead, each fact

relates directly to a specific duty created by the insurance contract between CIC and Dasher. The contract and these duties existed well before CIC engaged Murner as Dasher's legal counsel.

The insurance contract created specific reciprocal duties that CIC and Dasher were required to satisfy when certain claims of Dasher's liability were asserted. CIC's duty was to defend such claims and to satisfy the legitimate ones. These duties were conditioned upon Dasher's satisfaction of its own duty to cooperate with CIC "in the investigation, settlement or defense of the claim[.]" To be entitled to the benefits of its bargain with CIC, Dasher had to obtain CIC's approval of any settlement it expected CIC to pay. At the same time, however, the contract did not prohibit Dasher from paying a claim without CIC's approval and outside the contract – that is, by utilizing any other Dasher asset to settle the Hofmeisters' demands – but such a payment would be, according to the insurance contract, "at the 'insured's' own cost."[16]

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[16] We should not forget that a contract of liability insurance is simply an asset from which a liability may be satisfied. *See, Hillman v. American Mut. Liability Ins. Co.*, 631 S.W.2d 848, 848 (Ky. 1982)(liability insurance policy was tortfeasor's "only asset[.]"). Accident victims assert claims against alleged tortfeasors, not directly against the tortfeasor's insurer. Nothing prevents a tortfeasor's satisfaction of a claim from his assets other than insurance. It is simply because use of an insurance asset has the least disruptive effect on the continued operation of a business that it is naturally the first asset a business considers when contemplating claims settlement. However, whether to actually utilize that asset first remains the option of the business. It is not the option of the accident victim or his attorney to demand that the claim be satisfied from a contract of insurance.

CIC performed its duty to defend Dasher by selecting and agreeing to pay Murner to serve as Dasher's legal counsel. Experience tells us that an insurer is better able than its insured to select legal counsel to represent that insured. *State Farm Mut. Auto. Ins. Co. v. Marcum,* 420 S.W.2d 113, 120 (Ky. 1967)(insurer is "a professional defender of law suits[.]"), *overruled on other grounds, Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493 (Ky. 1975). Our courts will not penalize a party because he prudently authorized his experienced insurer to select the right attorney to defend him. *Asbury v. Beerbower,* 589 S.W.2d 216, 217 (Ky. 1979)(An insured who "has paid an insurance company to exercise that choice for him . . . should not be penalized for his prudence in that respect."). We are not surprised that such prudence was exercised in this case. When Dasher paid its premium, it purchased CIC's expertise in selecting an attorney and, when a claim was asserted, CIC performed. It simply makes no sense to conclude that CIC's performance of its duty to select Dasher's attorney also supports a finding that the attorney thereby became CIC's agent. Absent evidence that there was more to such selection and compensation than satisfaction of a duty to Dasher, we cannot conclude that this fact supports a finding that CIC controlled Murner.

The trial court and the Hofmeisters next place much reliance upon Murner's cooperation with CIC and the acknowledgment that he routinely obtained CIC's approval before offering settlement to the Hofmeisters. This reliance is misplaced.

As Dasher's agent, Murner had a duty to follow Dasher's instructions. If Murner's cooperation with

CIC had been contrary to Dasher's instructions, that would support an argument for Murner's role as CIC's agent. But nothing in the record suggests such a thing occurred. Murner's cooperation with CIC was consistent with the duty he owed to his client, Dasher; it was consistent with Dasher's duty to CIC; it was consistent with Murner's relationship to CIC as an independent contractor. *See, Latham, supra*, 282 S.W.2d at 848 (Fact that employer and independent contractor engaged in "daily conferences merely represented the [employer's] right to see that the work was progressing . . . and does not militate against the idea Latham was an independent contractor.").

The same can be said for Murner's act of obtaining CIC's approval before settlement was offered. Murner was, again, simply carrying out the contractual duty his client owed CIC.

It is also clear that Murner was not functioning as CIC's claims adjuster. The respective roles of the insured's attorney and the insurer's claims adjuster are entirely distinguishable. The adjuster's fundamental role is to settle the claim *apart from* litigation; the attorney's is to effectively conduct a defense *in* the litigation. The adjuster owes no independent loyalty to the insured apart from that owed by the insurer. The attorney's loyalty to his insured client is paramount. And, unlike the attorney whose conduct is controlled by his oath, the adjuster receives direction and authority from the insurer, which is why he has been deemed the insurer's agent. *Fidelity & Guaranty Ins. Underwriters, Inc. v. Gregory*, 387 S.W.2d 287, 289 (Ky. 1965). Furthermore,

> the adjuster and the claimant usually deal directly with one another. If their negotiations fail, the adjuster negotiates with plaintiff's counsel, and even after litigation is begun, the adjuster frequently deals directly with plaintiff's counsel.

Gailor v. Alsabi, 990 S.W.2d 597, 608 (Ky. 1999)(Lambert, C.J., dissenting).

Our conclusion that CIC did not control Murner is also strengthened by the undeniable fact that Murner and Dasher enjoyed an attorney-client relationship. When Murner undertook Dasher's legal representation, he became Dasher's agent, not CIC's. *Douthitt v. Guardian Life Ins. Co. of America*, 235 Ky. 328, 31 S.W.2d 377, 379 (1930)("an attorney is an agent of his client"). Kentucky has always jealously guarded the attorney-client relationship, for while "[t]he relationship is generally that of principal and agent . . . the attorney [owes his client] a higher duty than any ordinary agent owes his principal." *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky.App. 1978). As described *supra*, Murner's relinquishment of control to CIC would have required that he abdicate his professional responsibility, abandon his true principal, and jeopardize his career.

We conclude that where there is no evidence other than the fulfillment of those duties existing between the lawyer and the insured as his client, and the fulfillment of those duties existing between the insured and the insurer, there can be no finding of an agency relationship between the insurer and the attorney it hires to defend its insured. These duties exist and will be carried out in every case of this

nature. If we held that these facts alone would support a finding that the insurer controlled the attorney, not only would we have to conclude that the attorney is *always* the insurer's agent, we would be inviting, if not requiring, the very conflicts our caselaw and ethical rules seek to avoid. *See, e.g., American Ins. Ass'n, supra*; Kentucky Rules of Professional Conduct, (SCR) 3.130(1.7) and (1.8).

For their part, the Hofmeisters assert that additional evidence does exist. They claim Murner became directly involved in deciding whether CIC's policy covered his client's employee. Examination of the record does not support more than their attorney's argument to that effect, and the unrefuted evidence of record contradicts the assertion. In his testimony, Murner made the point, and we believe correctly, that the scope-of-employment issue (critical to his client's common law liability to Hofmeister) and the coverage issue (critical to CIC's contractual liability to Clark as a third-party beneficiary) were independent considerations, and that his focus was on the former. Murner's opinion regarding scope of employment may have affected CIC's decisions regarding coverage, but that alone will not support an agency relationship between CIC and Murner.

The Hofmeisters also believe that CIC should be judicially estopped from denying the agency relationship because of a prior assertion in this same proceeding that CIC's communications with Murner were privileged. We disagree. "The judicial estoppel doctrine . . . prevent[s] a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party *in a prior proceeding*." *Colston Investment Co. v. Home Supply Co.*, 71 S.W.3d

759, 763 (Ky.App. 2001)(emphasis supplied). Even if we were to expand the doctrine to include inconsistent positions within the same proceeding, we certainly could not do so selectively. We would have to apply the doctrine equally to the Hofmeisters who sought to avoid the attorney-client privilege by arguing below that Murner was not CIC's attorney. To use the Hofmeisters' attorney's words, "As this Court is well aware, an attorney can only represent the insured."

The Hofmeisters next argue that Murner had either actual or apparent authority to bind CIC in settlement negotiations. Though the brief makes virtually no reference to the record on this point, our examination does not disclose evidence to justify such a conclusion. Until the complaint was amended in mid-August 2001, there was no claim against CIC to be settled. After that point, attorney Risley was hired to represent CIC. We find it difficult to understand this argument under these circumstances. Evidence that Murner sought a release that would include CIC, and even evidence that Murner conveyed information to Golden that CIC would be responsible for negotiating Hofmeister's PIP settlement, is not inconsistent with Murner's independent contractor status *vis à vis* CIC.

However, the trial court, citing *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996), appears to have accepted this last argument. We believe that case is inapposite. The attorney with settlement authority at the center of *Clark* represented the tort claimant. *Id.* at 575. The only other attorney involved represented the joint tortfeasors and not either of their insurers. *Id.* In fact, no insurer is mentioned at all. *Clark* simply stands for the proposition that, under proper circumstances, an attorney can bind his client. CIC

was not Murner's client. Excluding a sort of circular argument, we simply cannot see how *Clark* supports the finding the CIC exercised the kind of control over Murner that would have made Murner its agent.

The Hofmeisters' argument that Murner could bind CIC in settlement reveals a fundamental confusion about the nature of the underlying claim. An automobile accident gives rise to a tort claim against the tortfeasor, but not any kind of claim against that tortfeasor's insurer (unless, of course, the claimant is also an insured under the same policy). The accident victim has no right, prior to obtaining a judgment against the tortfeasor, to assert a direct claim to insurance policy proceeds. *Central Mut. Ins. Co. v. Pippen*, 271 Ky. 280, 111 S.W.2d 425, 426 (Ky. 1937); *cf.*, *Wheeler v. Creekmore*, 469 S.W.2d 559, 564 (Ky. 1971)(where one jurist lamented the fact that an insurance contract is not "viewed as one vesting in the injured third party a direct cause of action;" Osborne, J., concurring). Consequently, CIC had no liability in the underlying tort action that would have required negotiation or compromise. If there had been evidence that Murner had authority to bind CIC, it would have been, at best, merely incidental to his duty to defend Dasher.

The record is devoid of any evidence that CIC exercised any actual control, invidious or otherwise, over the means by which Murner accomplished his representation of Dasher, including his efforts toward settlement of the tort claim. These settlement efforts are best characterized as an appropriate attempt by Dasher's attorney, utilizing a Dasher asset (the contract of insurance), in accordance with contract

terms requiring Dasher's cooperation and CIC's approval, to settle a tort claim against his client.[17]

We therefore agree with CIC that the trial court erred by denying its motion for directed verdict that Murner was not CIC's agent. Murner began and maintained his representation of Dasher as CIC's independent contractor. Consequently, the general rule prevails and CIC is not vicariously liable for any of Murner's actions undertaken in the performance of his representation of Dasher. *Miles Farm Supply v. Ellis*, 878 S.W.2d 803, 804 (Ky.App. 1994).

D. Whether the Trial Court Erred in Failing to Direct a Verdict in Favor of CIC on the Claim of Fraudulent Misrepresentation

CIC asserts the trial court erred by denying its motion for directed verdict on the Hofmeisters' claim of fraudulent misrepresentation. We agree.

Common law fraudulent misrepresentation requires proof of six elements: "(1) that the declarant made a material misrepresentation to the plaintiff, (2) that this misrepresentation was false, (3) that the declarant knew it was false or made it recklessly, (4)

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[17] In view of our holding, we need not rely on the alternative basis for reversal that the record is completely devoid of evidence sufficient to constitute the required mutual "manifestation of consent" that Murner serve as CIC's agent. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 50 (Ky. 2003). Without contradiction, Murner testified that he never consented to have either his litigation conduct or his settlement conduct controlled by CIC, and that his loyalty to his client was never compromised by any obedience to CIC inconsistent with his duty as Dasher's attorney.

that the declarant induced the plaintiff to act upon the misrepresentation, (5) that the plaintiff relied upon the misrepresentation, and (6) that the misrepresentation caused injury to the plaintiff." *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 262 (Ky.App. 2007). There must be clear and convincing proof of each of these elements. With regard to at least three of these elements, the proof was entirely lacking. Therefore, the trial court's denial of a directed verdict and judgment notwithstanding the verdict was clearly erroneous.

The trial court adopted the Hofmeisters' proposed fraud instruction language which misidentified the misrepresentation as "that there was only one (1) million dollars in insurance coverage[.]"[18] They claimed Murner made this statement as CIC's agent in his letter to Golden dated May 18, 2000. We have already determined that Murner was not an agent of CIC, but its independent contractor. Thus CIC is not vicariously liable for that statement. It is not debatable that no other CIC representative made such a statement. CIC cannot be the declarant of the alleged actionable representation. Therefore, no

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[18] There is a technical difference between the instruction's wording and the actual language the Hofmeisters alleged misled them – that their $1.5-million demand was "in excess of the policy limits provided by Dasher's insurance carrier[.]" The October 14, 2002, settlement conference is the first time the record reflects that either Murner or CIC represent that the limits of the policy CIC wrote for Dasher were $1,000,000. CIC proposed more generally that the instruction simply ask the jury to determine whether CIC had misrepresented "pertinent facts" regarding insurance coverage. Jury instructions identifying the alleged representation must portray it with accuracy.

evidence supports the first element of fraudulent misrepresentation – that CIC made a material misrepresentation.

The Hofmeisters respond by arguing that even if Murner was an independent contractor, CIC can still be liable for fraudulent misrepresentation on its own account. Arguing for what might be termed reverse engineering of the tort, they urge us to conclude that the jury inferred fraudulent misrepresentation from CIC's breach of its duty to disclose that Dasher had another asset to satisfy their claim, *i.e.*, the excess policy. This presumes a duty to disclose. However, the duty to disclose describes an element of the different tort of fraudulent concealment requiring proof of "substantially different elements." *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky.App. 2003).

Disregarding, *arguendo*, that the jury was not instructed as to the tort of fraudulent concealment, and further *equating* fraudulent concealment with fraudulent representation, *cf., Bankers Bond Co. v. Cox*, 263 Ky. 481, 92 S.W.2d 790, 792 (1936)("such concealment was in fact a false representation"), we do not find merit in either of the Hofmeisters' arguments that CIC owed them such a duty.

The Hofmeisters quote *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145 (Ky. 2003), for the proposition that "when the principal is under a duty to provide protection for . . . others and confides the performance of that duty to a servant . . . who causes harm to them by failing to perform that duty, vicarious liability attaches even if the agent or subagent is not a servant, *i.e.*, is an independent contractor" such as

Murner. *Id.* at 151. We believe *Williams* is not helpful. While an accurate quote, this is not an accurate reflection of the holding.

In *Williams*, two students skipped school and were involved in an automobile accident resulting in the death of one student. The student's estate sought relief against the Kentucky Department of Education (DOE) claiming negligent supervision. The principal issue in *Williams* was DOE's defense that

> local boards of education are not agents of the DOE but are separate and distinct agencies of the Commonwealth assigned to perform separate and distinct functions, *i.e.*, they are co-agents; and, thus, the DOE is not vicariously liable for the failures of employees of local boards[.]

Id. at 152. The principal holding in *Williams* was a rejection of that argument.

> From the language and structure of this statutory scheme, we conclude that the legislative intent was to vest the overall management, operation, and control of the common schools in the DOE, with the local boards of education *functioning as agents* of the DOE . . . . Thus viewed, the statutory relationship between the DOE and the local board was more *akin to that of principal-agent* than to that of co-agents.

Id. at 154 (emphasis supplied). The issues had nothing to do with independent contractors. The

language upon which the Hofmeisters rely is mere *dicta*.

Furthermore, we believe the Hofmeisters misinterpret these *dicta*. They argue this language supports a holding that CIC owed a duty to "provide protection" to them by disclosing the existence of a potential source of recovery for a liability they had yet to establish. We believe no such duty exists. *Cf.*, *National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752, 760-61 (6th Cir. 2007)(a slightly different concept; "no Kentucky court has recognized a duty" nor is there "any reason why the Kentucky Supreme Court would impose a duty on an insurance company [even] to investigate whether its insured has other insurance coverage."). Support for our view can be found by reading *Williams* more closely.

The *Williams* quote, referencing a duty to provide protection for others, is based on RESTATEMENT (SECOND)OF AGENCY § 251 (1958). Contrary to the Hofmeisters' suggestion, that section does not describe a manner in which vicarious liability may be *created* absent an agency relationship. As even the caption to § 251 illustrates, the kind of liability being described presumes the agency relationship *already exists*. RESTATEMENT (SECOND)OF AGENCY, *supra*, § 251 ("Liability For Physical Harm *Caused By A[n] Agent;*" emphasis supplied).[19]

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[19] Generally, RESTATEMENT (SECOND) OF AGENCY § 251 describes the liability of a party who, once owing a non-delegable duty of protection to a third person, cannot avoid liability on agency law grounds for the injury to that third person resulting from the negligence of an agent, regardless of whether the agent is a servant or a non-servant.

The Hofmeisters argue that there is an alternate source for CIC's duty. Citing *Smith v. General Motors Corp.*, 979 S.W.2d 127 (Ky.App. 1998), the Hofmeisters claim CIC's duty arose "from a *partial disclosure* of information, [or] from particular circumstances such as where one party to a contract has *superior knowledge* and is relied upon to disclose same." *Smith* at 129 (emphasis supplied). Neither argument has merit.

Taking the latter first, the "superior knowledge" argument requires that the "defrauder" and the "defraudee" be parties to the same contract. We should not have to point out that the Hofmeisters and CIC were not in privity.

The "partial disclosure" argument also fails. The Hofmeisters maintain that Murner's letter constitutes a disclosure about insurance coverage that, because it was only partially true, was a false representation of the *whole* truth. *See, Dennis v. Thomson*, 240 Ky. 727, 43 S.W.2d 18, 23 (1931). Therefore, goes their argument, CIC had a duty to supplement Murner's information with a disclosure of the excess policy. The problem with this argument, whether under a theory of fraudulent concealment or fraudulent misrepresentation, is that the Hofmeisters' reliance on the information conveyed must be reasonable.

The reliance element contained in Jury Instruction No. 3(f) carried with it the implicit requirement that the reliance be reasonable. *Harralson v. Monger*, 206 S.W.3d 336, 341 (Ky.2006)("[*B*]*lind* reliance . . . fails the fifth requirement of fraud – *reasonable* reliance upon the claimed fraudulent act."). (Emphasis supplied). Based on the record before us, the

Hofmeisters' reliance on their own or their attorney's impression of Murner's letter was unreasonable for several reasons.

Murner testified that when he learned Dasher had an excess policy, he told Golden about it, not once but twice. Golden did not take the stand to refute Murner, nor did the Hofmeisters present any other evidence contradicting Murner's testimony. Even if the jury chose to disregard Murner's testimony entirely, we are left with the transcript of the settlement negotiations, conducted on October 14, 2002, and attended by Golden, showing that the excess policy was referenced one-and-a-half dozen times. These references occurred before the conditions Golden placed on settlement were met and, therefore, before the Hofmeisters were legally committed to accept Dasher's settlement offer. In fact, after October 14, 2002, substantial issues remained and the Hofmeisters had to move the trial court to decide one of the issues remaining between the Hofmeisters' and Clark's insurers. The settlement agreement itself was not finalized until December 2002.

Most significantly, it is well established that "[i]f the truth or falsehood of the representation might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglected to do so, and he is remediless." *Bassett v. National Collegiate Athletic Ass'n.*, 428 F.Supp.2d 675, 684 (E.D.Ky. 2006), *quoting Mayo Arcade Corp. v. Bonded Floors Co.*, 240 Ky. 212, 41 S.W.2d 1104, 1109 (1931). The case cited most frequently in Kentucky for this point of law is one of our earliest. In *Moore v. Turbeville*, 2 Bibb 602, 5 Ky. 602, 1812 WL 644, 5 Am.Dec. 642 (Ky. 1812), our high court said:

> [W]here an ordinary attention would be sufficient to guard against imposition, the want of such attention is, to say the least, an inexcusable negligence. To one thus supinely inattentive to his own concerns, and improvidently and credulously confiding in the naked and interested assertions of another, the maxim "*vigilantibus non dormientibus jura subveniunt*," emphatically applies, and opposes an insuperable objection to his obtaining the aid of the law.

Moore, 5 Ky. at 604.

In the two and one-half years of substantial discovery that occurred in this case, the Hofmeisters elected never to seek discovery of the extent of Dasher's insurance as authorized by CR 26.02(2). We believe use of CR 26.02(2) perfectly illustrates the kind of "ordinary vigilance and attention" expected by this rule of law. On May 22, 2000, the Hofmeisters' attorney was "a little surprised" by Murner's representation of insurance.[20] This uneasiness could have been eliminated if only the Hofmeisters had asked for insurance information when they prepared and served discovery requests nine days later on May 31, 2000.[21] Failing to exercise that ordinary diligence at any time throughout the litigation, the Hofmeisters

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[20] Mr. Hofmeister testified that he too was surprised and, in response to Golden's examination at trial said, "I asked you to ask them about that [excess coverage] because I was surprised that they didn't have more insurance."

[21] They ignored the same opportunity when they served discovery requests in September 2000 and May 2001.

can claim no more than that theirs was the kind of "blind reliance" deemed unsatisfactory in *Harralson, supra*.

In response, the Hofmeisters cite *Meyers v. Monroe*, 312 Ky. 110, 226 S.W.2d 782 (1950), for the proposition that CIC "cannot escape on the ground that the complaining party should not have trusted him[.]" *Id.* at 785. They fail to note that *Bankers Bond Co. v. Cox*, 263 Ky. 481, 92 S.W.2d 790 (1936), relied upon as authority in *Meyers*, applies this concept only "where the one claiming to be deceived is not shown to have at hand any reasonably available means of determining the truth of representations made to him[.]" *Id.* at 792. Clearly, the Hofmeisters do not fall in the category of claimants contemplated by *Meyers*. Proof of the fifth element of fraudulent misrepresentation – reasonable reliance – is therefore entirely lacking.

There is yet a third element of fraudulent misrepresentation that entirely lacks proof in this case. There is no evidence that Murner knew the statement to be false when made on May 18, 2000. The Hofmeisters offered no evidence at all to refute Murner's testimony that he did not know of the existence of the excess insurance until later.[22] The

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[22] The Hofmeisters argue in their brief that Murner admitted that he kept the excess carrier "in the loop the entire time." They suggest this statement means Murner knew of the excess policy from the time he was engaged as Dasher's attorney. But this general statement, made as it was in a general context (and, in fact, denied by the excess carrier), is entirely consistent with Murner's specific testimony on this specific question. The general statement certainly is not clear and convincing evidence that

earliest documentary evidence of the excess policy is dated June 9, 2000. Therefore, no evidence supports the third element of fraudulent misrepresentation.

While CIC presents arguments regarding each of the six elements of fraudulent misrepresentation, our examination is sufficient to convince us that the Hofmeisters could not and did not establish that claim. The trial court erred by denying CIC's motion for a directed verdict on the Hofmeisters' claim of fraud.

E. Whether the Trial Court Erred in Failing to Direct a Verdict in Favor of CIC on the Claim of Violations of the UCSPA

The Hofmeisters alleged violations of several sections of the UCSPA. Although the jury was instructed on four of those sections, the allegations boil down to a claim that CIC did not promptly offer to pay the Hofmeisters what their claims were reasonably worth. *See, Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 454 (Ky. 1997).

This case exemplifies one of our Supreme Court's warnings about UCSPA claims – the fact "that the statute is not specifically designed to accommodate third party claims[[23]] . . . makes trial nearly impossible

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would convince a reasonable person that Murner's specific testimony was a fabrication.

[23] In fact, KRS 304.12-230 was never intended by its creators to establish any private right of action at all. The statute "is an almost verbatim adoption of the 1971 version of the model act formulated by the National Association of Insurance Commissioners (NAIC)[.]" *Davidson v. American Freightways,*

and appellate review most difficult." *Glass* at 460 (Lambert, C.J., dissenting). However, we have some clear guidance in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993) – "the leading case on 'bad faith' in Kentucky." *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 99 (Ky. 2000). Applying *Wittmer*, we have no difficulty concluding that the trial court erred in failing to grant a directed verdict in favor of CIC.

Justice Leibson's opinion in *Wittmer* was "the culmination of the development of 'bad faith' liability in our jurisprudence." *Id.* Writing for a unanimous Court, "Justice Leibson gathered all of the bad faith liability theories under one roof and established a test applicable to all bad faith actions, whether brought by a first-party claimant or a third-party claimant, and whether premised upon common law theory or a statutory violation." *Id.* at 100.

Inc., 25 S.W.3d 94, 96 (Ky. 2000). It was intended by its drafters only as regulatory measure to assist state insurance administrators. NAIC emphasized the "original intent" of this model act when it issued this warning to legislatures: "A jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This Act is inherently inconsistent with a private cause of action." NAIC Model Law, Regulations and Guidelines, Unfair Claims Settlement Practices Act, NAIC 900-1, Section 1. Purpose, Drafting Note (January 2008); *see also* NAIC 900-9 (January 2008), citing Proceedings of the NAIC, 1989 Proc. II 204. As a consequence, Kentucky is in that distinct minority of states that recognizes a private right of action for violations of the UCSPA. *See Hovet v. Allstate Ins. Co.*, 135 N.M. 397, 89 P.3d 69, 76-77 (2004)(allowing private right of action but requiring first that "there has been a judicial determination of the insured's fault and the amount of damages awarded in the underlying negligence action.").

We start with the proposition that there is no such thing as a "technical violation" of the UCSPA, at least in the sense of establishing a private cause of action for tortious misconduct justifying a claim of bad faith:

> [A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.... [A]n insurer is ... entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts.

Wittmer at 890 (quotation marks and citation omitted).

As it is the centerpiece of CIC's argument, we focus on the second element – the lack of a reasonable legal or factual basis for denying the claim. Considering all of the evidence in a light most favorable to the Hofmeisters, we conclude that CIC did have a reasonable basis for denying the Hofmeisters' claims. Those claims could not go forward against Dasher without establishing that Dasher was vicariously liable for Clark's acknowledged negligence. Vicarious liability depended upon whether Clark was acting in the scope of his employment at the time of the

accident. Despite the Hofmeisters' insistence otherwise, the answer to that question was not clear.

Until the Hofmeisters filed their complaint nearly a year after the accident, no one exhibited any conviction that Clark was acting in the scope of his employment with Dasher. He had completed his work and gone home. He was in his own vehicle, not Dasher's. The Hofmeisters' entire focus was on Clark and *his* automobile liability insurer. Not even Clark was sure he was working for Dasher at the time of the accident. The record before us does not reflect that he ever filed a workers' compensation claim. And when the adjuster for Hofmeister's insurer asked Clark, "Were you working on the job at the time [of the accident] or were you just on personal business?" Clark responded, "That's uh . . . that's debatable."

After the Hofmeisters filed suit naming Dasher as a co-defendant, their attorney insisted Dasher's liability was clear and it was bad faith to deny it. However, it took two years before Dasher, Clark and the Hofmeisters each filed summary judgment motions asking the trial court to determine vicarious liability. Dasher's motion, and Dasher's opposition to the Hofmeisters' and Clark's separate motions, presented legal and factual argument that Clark was not acting in the scope of his employment.[24]

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[24] Dasher's filing of these pleadings is litigation conduct. Litigation conduct amounting to bad faith can be sanctioned by the trial court pursuant to the civil rules. See the discussion, *infra* at Section II.F.1., of *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006) distinguishing litigation conduct and settlement conduct.

Although the trial court eventually concluded that Clark was acting within the scope of his employment, Clark never accounted for, nor did the trial court appear to consider, the fact that, in a geographic context, the accident occurred at a point that took Clark substantially away from the purported purpose for the trip – to return Dasher's keys.[25] In the language of the early common law, this is an example of a "frolic and detour." *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 776, 118 S.Ct. 2275, 2778, 141 L.Ed.2d 662 (1998)(referring to "the classic 'frolic and detour' for which an employer has no vicarious liability").

Accepting the trial court's determination that Clark left his home in pursuit of Dasher's business, the law is clear that to remain in the scope of employment, he must not have deviated from its pursuit. *Sharp v. Faulkner*, 292 Ky. 179, 166 S.W.2d 62, 63 (1942). But because Clark turned off that direct route and headed in the opposite direction, toward Georgetown where the accident occurred, there is a genuine question whether he was still on his employer's business at the time of the accident. In *Dennes v. Jefferson Meat Market*, 228 Ky. 164, 14 S.W.2d 408 (1929), our highest court considered such deviation in the context of the employee's use of his employer's vehicle. Where the employee is using his own vehicle, we believe *Dennes* must apply at least equally so.

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[25] We set aside the substantial factual dispute whether Dasher "ordered" Clark to return the keys, or whether he did so voluntarily.

> Where deviation from the course of his employment by the servant is slight and not unusual, the court may, as a matter of law, find that the servant was still executing his master's business. On the other hand, if the deviation is very marked and unusual the court may determine that the servant was not on the master's business at all but on his own. Cases falling between these extremes will be regarded as involving a question of fact for the determination of the jury.

Dennes at 409; *see also, Wyatt v. Hodson*, 210 Ky. 47, 275 S.W. 15, 16 (1925)(master not liable for employee's auto accident where employee deviated 4-1/2 blocks from direct route of master's business). As our high court said in *Wyatt*, this "is a case of going beyond the route required in the service of the master, and in doing this he was acting for himself and not in the course of his employment." *Id.*; *see also, Winslow v. Everson*, 221 Ky. 430, 298 S.W. 1084, 1085 (1927). As held in *Model Laundry v. Collins*, 241 Ky. 191, 43 S.W.2d 693 (1931), Clark's personal venture would not have terminated nor would his service for Dasher have resumed until he returned to the point of departure from the business route – Interstate 64 – a point he never reached. *Id.* at 693.

Because the underlying accident case was settled, the trial court's decision regarding scope of employment was never challenged. However, whether the trial judge was correct is not the issue – the issue is whether Dasher's defense was "debatable on the law or the facts." *Wittmer* at 890. We are satisfied that the "defense was not only fairly debatable, it had substantial merit." *Bentley v. Bentley*, 172 S.W.3d 375,

378 (Ky. 2005)(citation omitted). Since we conclude Dasher's defense was fairly debatable, we must also conclude that CIC's denial of the Hofmeisters' claim was reasonable. Therefore, under *Wittmer*'s second element, there can be no UCSPA violation.

With regard to allegations that four individual sections of the UCSPA were violated, CIC specifically argues that the trial court should not have let the case go to the jury. We agree that the trial court turned the case over to the jury for resolution of an issue that was uniquely the trial court's alone to make.

Whether a tort has occurred under KRS 304.12-230 is precisely what *Wittmer* requires the trial court, not the jury, to decide. The "threshold problem" is to determine "whether the dispute is merely contractual or whether there are tortious elements justifying an award of punitive damages[.]" *Wittmer* at 890. To do that, the trial court *must* weigh in on the question of punitive damages by answering "whether the proof is sufficient for the jury to conclude that there was conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* (internal quotation marks omitted). The order denying the Hofmeisters' summary judgment motion shows the trial court did not make such a finding.

The Hofmeisters specifically sought the trial court's determination that CIC had violated four sections of KRS 304.12-230. The court declined

> to find that the conduct of Defendant [CIC] was "outrageous because of the defendant's evil motive or his reckless indifference to the rights

> of others." Wittmer v. Jones, 864 S.W.2d 885, 890 (1993). Such a determination of evil intent or indifference . . . is within the province of the jury, but not within the province of this Court on a motion for summary judgment.

Trial Court's Opinion and Order, May 17, 2004.[26] The trial court's mistaken belief that this question was for the jury does not take away from the fact that, when presented with the question, it declined to find evidence of tortious conduct, outrageous behavior, evil motive or reckless indifference to the Hofmeisters' rights. Considering the threshold, this is not surprising.

> The evidentiary threshold is high indeed. Evidence must demonstrate that an insurer has engaged in outrageous conduct toward its insured. Furthermore, the conduct must be driven by evil motives or by an indifference to its insureds' rights. Absent such evidence of egregious behavior, the tort claim predicated on bad faith may not proceed to a jury.

United Services Auto. Ass'n v. Bult, 183 S.W.3d 181, 186 (Ky.App. 2003). While *Bult* is a first-party case, there is no justification for lowering the standard for

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[26] However, in its Opinion and Order denying CIC's post-trial motions, the trial court stated that "regarding the claim of statutory bad faith there was sufficient evidence of bad faith to present the question of punitive damages to the jury." Opinion and Order, October 25, 2004, p.6. Much of that evidence, however, was of litigation conduct admitted over CIC's objection and contrary to the subsequent holding in *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 522 (Ky. 2006).

third-party claims deriving as they must from the first-party's contract of insurance. Our Supreme Court has long embraced this approach in both first-party and third-party claims under the common law where it was recognized that bad faith determinations present "*troublesome, or even impossible, question[s] for the jury* [which] is just not equipped to evaluate [t]he issue of 'bad faith'[.]" *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 499-500 (Ky. 1976)(emphasis in original). We believe *Wittmer* simply extended to tort actions under KRS 304.12-230 the same requirement still existing under the common law that "[t]he issue of 'bad faith' should be decided by the trial court." *Id.* at 500; *see*, *Ruby Lumber Co. v. K.V. Johnson Co.*, 299 Ky. 811, 187 S.W.2d 449 (1945)("until repealed or altered by the Legislature . . . [w]e are not at liberty to ignore the common law totally [and] the intention to abrogate the common law is not presumed.").

A review of the evidence presented reveals a complete absence of the type of conduct required to clear the evidentiary threshold to send this case to a jury on a claim that CIC violated the UCSPA. The trial court's May 17, 2004, Opinion and Order implicitly supports this conclusion.

Our opinion is not changed, but bolstered, by our examination of the individual sections of the UCSPA upon which the jury was instructed – KRS 304.12-230(1), (6), (13), and (14).

Section (1) prohibits an insurer from "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue." All previous discussion regarding the Hofmeisters' claim of

fraudulent misrepresentation applies as well to this claim. In addition, this section addresses "coverages" – a term used through the Insurance Code, KRS Chapter 304. Though not defined by statute or Kentucky caselaw, "coverages" is a term that identifies "the amount and extent of risk *contractually* assumed by an insurer." *Illinois Farmers Ins. Co. v. Tabor*, 642 N.E.2d 159, 163 (Ill.App.1994), *citing* BLACK'S LAW DICTIONARY 365 (6th ed. 1990)(emphasis supplied). It is an abbreviated means by which we define what the insured has contracted for in exchange for his premium. "Coverages at issue" therefore refers to an insured's[27] contractual dispute with his insurer, and not an accident victim's tort dispute with the insured-tortfeasor, or an accident victim's dispute with the insurer (unless as the assignee of the insured's rights under the contract he stood in the insured's shoes).

Under section (6), an insurer violates the UCSPA by "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]" At least with

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[27] Of course, for purposes of defining the class of persons protected by the KRS 304.12-230(1), this would include both first-party insureds and third-party claimants to whom the insured assigned (as under common law) his claim against the insurer. A close reading of *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1988) indicates that, consistent with common law bad faith, Reeder was an assignee of the insureds' (the Hamptons') contractual rights. This is the only explanation for the Supreme Court's statement that the case involved "a *contractual* dispute over the amount of damages[.]" *Id.* at 118 (emphasis supplied). Unless the Hamptons assigned their contractual rights to Reeder, Reeder could have had no contractual right at all *vis-à-vis* the insurer.

regard to third-party claims, we believe the *Wittmer* standards encompass this provision. As we just described, *supra*, the requirement that liability be reasonably clear was not met. Furthermore, we have yet to mention Golden's unreasonable demand that Dasher, and CIC, should need nothing more as proof of Mr. Hofmeister's $5,000,000-loss than his partially self-determined tax returns. Again, we turn to *Wittmer*, with some modifications applicable to this case.

> Although an insurer is under a duty to promptly investigate and pay claims where it has no reasonable grounds to resist in good faith, neither this duty nor any provision of the UCSPA requires the insurer to assume responsibility to investigate the amount of the claimant's loss for the claimant. The insurer'[s] legal responsibility is limited to payment upon proof of loss. The only proofs presented to [CIC] were the [largely] unsubstantiated amounts stated in the demand letter from [Hofmeister's] counsel. This letter provided neither supporting documents nor reference to reliable sources.

Wittmer at 891-92. Under these circumstances, the June 22, 2000, settlement offer can only be rationally viewed as a good faith offer. Despite a reasonable belief that Dasher may have no liability whatsoever, CIC authorized Dasher's use of the equivalent of $259,000 of its $1,000,000-policy to settle all but the lost income portion of the Hofmeisters' demands. That offer was rejected. Most significantly, the Hofmeisters withdrew their $1,000,000-offer, never to present it again. Instead, they chose to litigate, making no

further settlement demands.[28] We cannot find in the record any evidence that would have justified the trial court in allowing the jury to consider whether CIC violated KRS 304.12-230(6).

Section (13) of the UCSPA allows a private right of action against an insurer for "[f]ailing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage[.]" Again, liability was not clear. Even if it had been, the Hofmeisters' claims were not claims under multiple portions of Dasher's insurance policy; they all arose under the same portion – Section II, Liability Coverage. Like KRS 304.12-230(1), the class of persons protected by this section are first-party insureds and third-party assignees of the first-party's rights.

Section (14) makes an insurer liable for "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement[.]" This is clearly another coverage issue that plainly refers to first-party claims. Still, logic requires that it fail for additional reasons. The Hofmeisters' underlying tort claim was not against CIC but against Dasher. The bases for denial of that tort claim for vicarious liability were fully set out in Dasher's answer and discovery responses. Any

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[28] The Hofmeisters' February 2001 attempt to accept a portion of Dasher's earlier offer (which they had rejected) was not a demand for settlement.

duty we can possibly read into section (14) would have required CIC to simply repeat Dasher's defenses. The law will not require such a useless exercise. *Blackerby v. Monarch Equipment*, 259 S.W.2d 683, 686 (Ky. 1953). But if somehow we concluded CIC did breach this section, we fail to see how the breach could cause any injury. It would be a mere "technical violation" for which no relief will be granted. *Wittmer* at 890.

For all of the foregoing reasons, we believe the trial court committed reversible error when it failed to direct a verdict in favor of CIC on the claims that it violated the UCSPA.

F. CIC's Remaining Arguments for Reversing the Verdict and Judgment

Consideration of the remaining claims of error is not necessary to determine CIC's liability. However, to understand the role of passion or prejudice in this jury's verdict, additional consideration is appropriate.

In particular, our consideration of three of CIC's arguments reveals aspects of that role. First, the trial court's denial of CIC's motion to exclude evidence of litigation conduct resulted in the jury's consideration of evidence deemed inadmissible both by *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006), and the Court of Appeals opinion it reversed. Second, the conduct of the Hofmeisters' attorney was considered "improper" by the trial court, but not so improper as to justify a new trial. That conduct, however, appears calculated to, and we believe did, have the effect of arousing the passion or prejudice of the jury. Third, while proof of the Hofmeisters' substantial reversal of economic fortune is undeniable, our examination of the

record reveals nothing more than bold speculation that the reversal of fortune was caused by CIC's conduct.

We neither presume in any particular case, nor deny the proposition in general, that there is "a prejudice which juries frequently apply against insurance companies. Our courts have long been aware of this prejudice, as exemplified by our decisions in personal injury cases where the element of insurance has been improperly injected." *Aetna Freight Lines, Inc. v. R. C. Tway Co.*, 298 S.W.2d 293, 296 (Ky. 1957). We cannot quantify such prejudice in any case. But, in any degree, such an atmosphere combined with the other factors present in this case is entirely conducive to the creation of a "perfect storm" – a verdict and judgment so palpably and flagrantly against the evidence as to indicate it was the product of passion or prejudice.

1. Whether Litigation Conduct Is Actionable Under the UCSPA

Following the Supreme Court's rendition of *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006), both parties supplemented their briefs with additional authority.[29] Knotts reversed the Court of Appeals opinion in *Knotts v. Zurich Ins. Co.*, 2002-CA-001846 (Feb. 6, 2004), that no post-litigation conduct by an insurance company can be the basis of a UCSPA claim. However, in reversing the Court of Appeals, the Supreme Court reopened the door only in the slightest

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[29] CIC referred us to *Knotts* while the Hofmeisters cited a case interpreting *Knotts*, *Hamilton Mut. Ins. Co. of Cincinnati v. Buttery*, 220 S.W.3d 287 (Ky.App. 2007).

degree. Litigation conduct was held inadmissible by both courts.

The Supreme Court identified "a distinguishing factor between the insurer's settlement behavior during litigation and its other litigation conduct." *Id.* at 523.

> We are confident that the remedies provided by the Rules of Civil Procedure for any wrongdoing that may occur within the context of the litigation itself render unnecessary the introduction of evidence of litigation conduct.

Id. at 522. Attorneys, and even parties,

> are subject to direct sanction under the Civil Rules for any improper conduct. Though it goes without saying, we also note that those attorneys have significant duties under the Rules of Professional Responsibility, which allow for further sanctions for unethical behavior. Thus, we think the better approach is an absolute prohibition on the introduction of such evidence in actions brought under KRS 304.12-230.

Id. This has been referred to as "*Knotts's* . . . litmus test for inadmissible litigation conduct[.]" *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 535 (6th Cir.2006)("bad litigation conduct that the Rules of Civil Procedure adequately remedy [is] inadmissible to prove bad faith.")(applying Kentucky law).

The trial court below did not have the benefit of *Knotts's* specific analysis but did have CIC's general

argument and objection substantially to the same effect. Nevertheless, over CIC's objection, Golden was permitted to admit evidence and to argue the propriety of litigation tactics, including but not limited to: the timing and sequence of discovery; whether it was proper to file a third-party complaint against Clark before taking his deposition; the assertion of subrogation and indemnification rights; the decision not to file a declaration of rights action to determine whether the insurance policy covered Clark; and whether Murner should have subpoenaed documents from the Hofmeisters rather than using other more traditional means of obtaining information from adverse parties.

In *Knotts*, the Supreme Court considered it calamity to "permit the jury to pass judgment on the defense counsel's trial tactics and to premise a finding of bad faith on counsel's conduct" stating that it "places an unfair burden on the insurer's counsel, potentially inhibiting the defense of the insurer." *Id.* at 523. In fact, "given the chilling effect that allowing introduction of evidence of litigation conduct would have on the exercise of an insurance company's legitimate litigation rights, any exception threatens to turn our adversarial system on its head." *Id.* at 522. *Knotts* expresses the fear that a jury, "with the assistance of hindsight, and without the assistance of insight into litigation techniques, could second guess the defendant's rationales for taking a particular course." *Id.* at 520-21. The case before us represents the coming to fruition of that fear.

2. Whether Conduct of Hofmeisters' Counsel Required a New Trial

CIC moved the trial court for a new trial based on the misconduct of the Hofmeisters' counsel. *See*, CR 59.01(d). The trial court "agree[d] that Plaintiffs' attorney engaged in some improper behavior" but held that its admonition of both attorney and jury was sufficient to cure the impropriety.

Because Golden was a witness to much of CIC's alleged actionable conduct, his role as advocate was complicated, albeit by his own choosing. Often when Golden was cross-examining Murner regarding oral communications to which only they were privy, the challenging tone of the question itself bore the implicit counter-testimony to Murner's response. Golden's interrogation of Murner regarding his first disclosure of the excess coverage is an example.

> Golden: [T]he first time the excess carrier was brought up was back there when Melissa Wilson was on the phone [at the October 14, 2002, transcribed settlement conference] isn't that true?
>
> Murner: No, sir.

Of course, only Murner's answer is admissible evidence, but without taking the witness stand, Golden effectively represented to the jury that he knew nothing of the excess policy until that moment.[30]

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[30] There are several instances of Golden stating a fact in his question of Murner for which Golden presented no evidence, each

We need not question the trial court's ruling on Golden's conduct. However, we cannot escape the belief that the jury's verdict was affected by the cumulative effect of his "improper behavior."

3. Whether the Hofmeisters Proved Any Economic Loss Was Caused by CIC

CIC's argument that there was no proof of a causal connection between its conduct and the Hofmeisters' economic woes is based on *Roadway Exp., Inc. v. Don Stohlman & Associates, Inc.*, 436 S.W.2d 63 (Ky. 1968).

> The test of whether there can be a recovery for loss of anticipated revenues or profits is . . . whether the cause of the damage or injury can with reasonable certainty be attributed to the breach of duty or wrongful act of the defendant. . . . But no recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made or from other sources.

Id. at 65.

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of which Murner denied: "Mr. Risley . . . talked about me withdrawing our demand for a million. I reinstated that demand right after that;" "I could have gotten a hundred million dollar verdict against those two young men [Dasher's principals];" "[Y]ou and I went back to that jury room right there, you said you were going to pay a million and I accepted;" and "[I] never agreed to release Fireman's Fund."

The Hofmeisters claim the causal connection is obvious and readily revealed in their theory of damages. Their theory is as follows:

(1) CIC misrepresented that Dasher had only $1,000,000 in insurance coverage;

(2) In fact, the CIC and Fireman's Fund policies combined for a total of $6,000,000 in coverage;

(3) If both insurers had tendered policy limits in June 2000, the Hofmeisters would have netted $4,000,000 after attorney fees;

(4) Mr. Hofmeister testified that if he had received a net $4,000,000 in June 2000, "it would have made a huge difference" that would have allowed him "to work out plans with different companies . . . to go out and buy a whole series of those bonds because they were trading on the open market at a huge discount" and he could have made "[r]oughly a hundred million dollars."

The Hofmeisters, not having their own expert, claim CIC's economic expert, James O. King, Jr., supported this theory and the testimony. Our examination of the actual exchange between Golden and Mr. King makes us dubious.

Golden: And you can't tell this jury, Mr. King, that if George Hofmeister was paid $4

million in cash in June of 2000, that it wouldn't have made a difference.

King: $4 million. I mean, I don't know, that's a sizeable amount of money and it might have enabled someone to keep a business going for a while, I don't know.

Golden: All right, the fact is you don't know, do you?

King. No.

In the final analysis, the theory is both factually and logically flawed.

The Hofmeisters never demanded $6,000,000 (or even the net figure of $4,000,000) in June 2000 or at any time.[31] To suggest they were entitled to have CIC and Fireman's Fund write checks to the Hofmeisters totaling $6,000,000 based on Golden's unsubstantiated demand of only $1,500,000 is both factually unsupported and completely illogical.

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[31] Though it went without objection, Golden's question to King impermissibly assumed this fact was in evidence. Our Supreme Court held that "a connection must be established between the cross-examination proposed to be undertaken and the facts in evidence. A [party] is not at liberty to present unsupported theories in the guise of cross-examination and invite the jury to speculate as to some cause other than one supported by the evidence." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997)(in a criminal context but citing Kentucky Rule of Evidence 403).

Mr. Hofmeister's testimony that he could have turned $4,000,000 in "stake" money into $100,000,000 is the unadulterated epitome of speculation. Furthermore, there is reason to question the veracity of that testimony as the record shows Hofmeister borrowed $6,000,000 in January 2000 from a friend and business associate, Richard Burkhart, and Hofmeister's businesses still failed.

Nothing more than speculation supports the allegation that CIC's conduct caused the Hofmeisters' economic losses.

Regardless, we have identified sufficient factors to convince us that the jury's verdict was the product either of passion or prejudice or a combination of both. For the several reasons set forth above, the judgment against CIC must be reversed.

III. *Hofmeister v. Cincinnati Insurance Company*, No. 2004-CA-002362-MR

The Hofmeisters' appeal challenges only the trial court's reduction of the punitive damages award from $18,405,500 to $10,000,000. In view of our decision that CIC was entitled to directed verdicts on the fraudulent misrepresentation claim and the claim of violation of the UCSPA, Appeal Number 2004-CA-002362-MR must be dismissed as moot.

IV. Conclusion

Considering the law as applied to the undisputed facts, we must conclude that the Scott Circuit Court's denial of Cincinnati Insurance Company's motions for directed verdict and for judgment notwithstanding the

verdict as to the claim of fraudulent misrepresentation and as to the claim that it violated KRS 304.12-230 was clearly erroneous. For the foregoing reasons, the judgment of the Scott Circuit Court in Appeal Number 2004-CA-002296-MR is reversed.

KNOPF, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

ORAL ARGUMENT AND BRIEFS
FOR APPELLANT AND
CROSS-APPELLEE:

John T. Ballantine
Louisville, Kentucky

Ronald L. Green
Lexington, Kentucky

BRIEFS FOR APPELLANT AND
CROSS-APPELLEE:

Michael D. Risley
Louisville, Kentucky

ORAL ARGUMENT AND BRIEFS
FOR APPELLEES AND
CROSS-APPELLANTS:

J. Dale Golden
Lexington, Kentucky

AMICUS CURIAE BRIEF FOR
THE KENTUCKY DEFENSE COUNSEL:

Gregg E. Thornton
Luke A. Wingfield
Lexington, Kentucky

APPENDIX D

SUPREME COURT OF KENTUCKY

CASE NO. _____

[Dated November 6, 2008]

GEORGE HOFMEISTER and	)
KAY HOFMEISTER	)
MOVANTS	)
	)
VS.	)
	)
CINCINNATI INSURANCE COMPANY	)
RESPONDENT	)
	)

Appeal from Scott Circuit Court
Civil Action No. 00-CI-00030
Appeal from Kentucky Court of Appeals
No. 2004-CA-002296-MR and
No. 2004-CA-002362-MR

MOTION FOR DISCRETIONARY REVIEW

* * *

[Certificate of Service omitted in printing of this appendix]

Pursuant to CR 76.20, the Movants, Plaintiffs, George and Kay Hofmeister, hereby move this Court for discretionary review of the Opinion Reversing

Appeal No. 2004-CA-002296-MR and Dismissing as Moot Appeal No. 2004-CA-002362-MR, rendered by the Court of Appeals on October 17, 2008[1], and the original Opinion, rendered on September 26, 2008[2], that was subsequently modified by the October 17, 2008 Opinion; as well as the Order Denying Motion to Strike Brief, entered by the Court of Appeals on September 12, 2008.[3] In support of their Motion, the Movants state as follows:

PARTIES

(a) Movants George Hofmeister and Kay Hofmeister are represented by J. Dale Golden, Golden & Walters, PLLC, 771 Corporate Drive, Suite 905, Lexington, Kentucky 40503.

(b) Respondent Cincinnati Insurance Company is represented by Michael D. Risley, Stites & Harbison PLLC, 1800 Providian Center, 400 West Market Street, Louisville, Kentucky 40202; Ronald L. Green, Boehl, Stopher & Graves LLP, 444 West Second Street, Lexington, Kentucky 40507; and John T. Ballantine, Ogden, Newell & Welch PLLC, 500 West Jefferson Street, Suite 1700, Louisvlle, Kentucky 40202.

(c) The Opinion by the Court of Appeals to be reviewed is dated October 17, 2008 (originally rendered September 26, 2008 but modified by the

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[1] *See* Appendix **1**.

[2] *See* Appendix 2.

[3] *See* Appendix 3

October 17, 2008 Opinion) and the Order Denying Motion to Strike Brief that was entered on September 12, 2008. There has been no supersedeas bond or bail on appeal executed.

(d) A clear and concise statement of the facts.

STATEMENT OF MATERIAL FACTS

The jury awarded George and Kay Hofmeister a record bad faith verdict of $28,405,500.00 against Cincinnati Insurance Company ("CIC"). At the bad faith trial, CIC's bad faith expert, Carl Sumner, could not explain CIC's offers in the underlying tort claim going from $25,000.00, eleven days before trial; to $150,000.00, three days before trial; to $350,000.00 on the morning of trial; and then up to $1 million five minutes later.[4] CIC's conduct is all the more vexing because, despite the fact that it had increased its reserves to $1 million in its June 9, 2000 Reserve Increase Memorandum, CIC did not offer the $1 million limits until the trial on October 14, 2002.

On November 3, 1998, George Hofmeister was involved in a motor vehicle collision with a vehicle driven by an employee of Dasher Express named Eugene Clark. Mr. Clark had driven for Dasher the previous day and finished his shift at 10:00 a.m. on

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[4] The original offer of judgment eleven days before trial was for $175,000.00, but included all claims of Kentucky Farm Bureau, who had paid $50,000.00 in PIP and $100,000.00 as a substitution payment to preserve its subrogation claim regarding the Hofmeisters' UIM claim. Thus, CIC describes these offers in the following amounts: $175,000.00; $300,000.00; $500,000.00; and $1,000,000.00.

November 3, 1998. He inadvertently took the keys and credit card associated with the commercial vehicle to his home when he left work. Dasher contacted Clark and instructed him to return the keys and credit card, despite his protests of being fatigued. Clark fell asleep behind the wheel of his vehicle as he was returning the keys and credit card, causing his vehicle to cross the centerline, striking the Hofmeisters' vehicle head on. Clark had no recollection of the accident.

Mr. Hofmeister sustained serious injuries, confining him to a wheelchair for five months and then requiring him to use a walker to regain his mobility. As a result, Mr. Hofmeister's W-2 earnings decreased by approximately $5 million from 1998 to 1999. The Hofmeisters filed suit against Dasher and Clark, alleging that Clark was within the scope of his employment with Dasher. CIC's former employee, Kim Gipson, admitted that she filled out the October 29, 1999 "Auto Initiation Report," which indicated there was no question regarding coverage; that Clark, as an employee of Dasher, was going back to Dasher's premises to return the keys when he fell asleep at the wheel, striking the vehicle driven by Hofmeister; and that liability was "clear."

CIC retained attorney Murner to defend Dasher. Clark's personal carrier, Travelers, retained Wilson to defend him. CIC's Casualty Supervisor, Major, documented on May 19, 2000 that the scope of employment issue regarding Clark being within the scope of employment with Dasher at the time of the accident, "must be resolved by the filing of a

declaratory judgment action.[5] More importantly, Major documented the fact that Murner also recommended the filing of a declaratory judgment action. Major admitted that CIC's own written policy, which was introduced into evidence, required it to resolve coverage questions at the front end.

CIC's employee, Julie Sullivan, drafted a June 9, 2000 Reserve Increase Memorandum. It stated: "[h]owever, if our insured did indeed order Mr. Clark to return the keys, which it appears they did, Dan feels Dasher would be found vicariously liable and a dec action is not an option. "[6] In fact, Sullivan admitted at trial: "[w]e were proceeding under the assumption that he would be found in the course and scope of his employment." Thus, CIC increased its reserve on the claim to $1 million when it concluded that Clark was in the scope of his employment with Dasher at the time of the accident and was a CIC insured. Therefore, CIC never brought a declaratory judgment action on the scope of employment issue due to the fact it, as well as Murner, had concluded that Clark was acting within the scope of his employment.

Although CIC was well aware that Clark was its insured and despite the fact that Murner participated in resolving the coverage issue, Murner filed a cross-claim on behalf of Dasher against Clark. Dasher's cross-claim against the CIC insured Clark was designed to raise questions in the minds of the

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[5] Major ordered the filing of a declaratory judgment action almost 2-1/2 years before the trial date of October 14, 2002.

[6] The reference to "Dan" is a reference to Dan Murner, the attorney hired by CIC to defend Dasher.

Hofmeisters and manufacture an ostensibly reasonable basis for CIC to make low-ball offers to the Hofmeisters. Proof of this course chosen by CIC and Murner is reflected in Murner's June 22, 2000 settlement offer wherein an offer is made for $109,275.00 (exclusive of KFB Liens), wherein Murner states: "[d]asher believes that it has a strong liability defense in this case in that Mr. Clark, the actual tortfeasor, was not acting within the scope of his employment with Dasher; therefore, Dasher cannot be vicariously liable for the Hofmeisters' damages, if any." Of greater import is the fact that Murner conspicuously omitted the excess carrier, Fireman's Fund, from the proposed release.[7] CIC and Murner knew that if Plaintiffs' counsel ever learned of the $5 million in excess coverage provided by Fireman's Fund, the Hofmeisters would demand more than the $1 million limits of CIC's policy. The Hofmeisters had been led to believe that $1 million was the limit of coverage available. Plaintiffs' counsel confirmed in four separate correspondences to Murner that $1 million was the extent of available insurance coverage to Dasher.

Murner caused three continuances of the trial of the Hofmeisters' underlying tort claim. Murner attempted to blame the Hofmeisters for the delay in the case; however, Murner admitted that two years elapsed between the time he looked at all of the

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[7] At the conclusion of the underlying tort claim, after Murner first disclosed the fact that there was $5 million in excess coverage, he refused to pay the $1 million from CIC unless the excess carrier was included in the release.

Hofmeister documents and the time that the $1 million offer was made.

As the trial date of October 14, 2002 approached, CIC was kept informed of the Hofmeisters' financial demise through Murner. Although the Court of Appeals seems to have accepted CIC's contention that the Hofmeisters withdrew their $1 million demand and never made another demand, this contention was contradicted twice by Murner and twice by CIC's bad faith expert, Sumner.

Sumner Testimony:

Q6 Mr. Sumner, I want to clear one thing up right off the bat. Isn't it true that Mr. Hofmeister was demanding the policy limits of the insurance that was available throughout the entire case?

A. Yes.[8]

Murner Testimony:

Q237 But I just want to make sure that throughout the entire case it was clear to you and Cincinnati Insurance Company that Mr. Hofmeister was demanding a million dollars?

A. From - - here is how I'll say it. From the point you sent me the demand letter to

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[8] TR. V, p. 86.

> the end of the case, I think it was a million dollars, okay?[9]

The Hofmeisters' financial outlook just prior to the automobile collision was so bright that Mr. Hofmeister was negotiating for a $25 million "unsecured" line of credit from Republic Bank of New York. Two of the banks loan officers recommended Mr. Hofmeister for the unsecured line of credit but, after the motor vehicle collision, the request was denied. The Hofmeisters' net worth, which was $196,713,000.00 a month after the accident, plunged to a negative $6,508,500.00 over the next five years, with an additional $35 million judgment being granted against the Hofmeisters in favor of JPMorgan Chase Bank shortly after the trial. The Hofmeisters were denied the opportunity to recover future economic harm as the trial court refused, over the Hofmeisters' objection, to include a provision for recovery of future economic harm in the jury instructions.

On September 13, 2002, the trial court entered summary judgment, finding that Clark was acting within the scope of his employment with Dasher at the time of the accident.[10] This ruling was never contested;

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[9] TR II, pp. 99-100.

[10] The Court of Appeals found the delay in settling the case was reasonable because the scope of employment issue had not been resolved. It failed to appreciate that almost 2-1/2 years earlier, CIC had already determined that Eugene Clark was in the scope of his employment. Regardless, after the summary judgment order of September 13, 2002, this issue had clearly been resolved and CIC should have immediately offered its limits of $1 million due to the fact that its bad faith expert, Carl Sumner, could not

in fact, on October 3, 2002, Dasher stipulated liability while CIC reduced its June 22, 2000 offer of $109,275.00 (exclusive of all liens) to the amount in the offer of judgment, a net amount of $25,000.00.[11]

On October 14, 2002, the morning of trial, Murner presented the Hofmeisters with a correspondence indicating that a million dollars would never be offered and that the final settlement offer was "$500,000.00 inclusive of all liens/claims, to include but not limited to, KFB's claim for basic reparation benefits recovery and their putative claim for recovery of the $100,000.00 advanced to Mr. Hofmeister." The correspondence further indicated that, "[t]his offer expires when the parties announce ready at trial." The Hofmeisters immediately announced ready for trial, prompting Murner to immediately request the trial judge to give him a few minutes. Within five minutes, Murner offered the Hofmeisters $1 million to settle their claim. The Hofmeisters immediately accepted the offer. Thereafter, counsel then went back to the judge's chambers to discuss what had occurred. While in the judge's chambers, attorney Golden, for the first time, learned that there was excess coverage in the amount of $5 million.

The Hofmeisters had already been informed that the case had settled for $1 million. The Hofmeisters experienced a tremendous amount of relief upon

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identify any changes in the case to justify the rash of settlement offers to follow.

[11] ($175,000.00 inclusive of KFB's $50,000.00 PIP lien, and its substitution payment of $100,000.00 to preserve its subrogation rights in the UIM claim).

learning that they would not have to go endure the rigors of a jury trial. Thus, after the $5 million excess coverage was disclosed, the election was made to affirm the settlement agreement and recover damages in tort.[12] This decision turned out to be in the best interests of the Hofmeisters. The Hofmeisters' lack of knowledge of the excess carrier is corroborated by the fact that they never demanded a penny from the excess carrier nor corresponded in any manner with the excess carrier. It is beyond cavil that the Hofmeisters would have at least asked the excess carrier to contribute something since CIC's full $1 million limits was being paid. Also, it is clear that Murner had no right to demand that the excess carrier be included on the release even if he felt a bad faith claim was developing.[13]

The Hofmeisters desperately waited for the $1 million payment from CIC. Finally, Plaintiffs' counsel sent Murner correspondence, threatening that if the $1 million was not paid immediately, a motion to force

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[12] *See* Hanson v. American Nat'l Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993), a copy of which was provided to each judge on the panel of the Court of Appeals during oral argument. (Where a fraud has been perpetrated to induce a party to enter into a contract, the injured party may elect to affirm the contract and recover damages in tort for the fraud or disaffirm the contract and recover the consideration with which he has parted).

[13] The Hofmeisters introduced into evidence an October 9, 2002 email from the excess carrier, Fireman's Fund, to CIC supervisor, Dan Walsh, and attorney Dan Murner. Fireman's Fund sought to hold CIC responsible for any payment that it may have to make, because of, " . . . the fact that the Insured's defense has been potentially comprised by the failure to extend a defense to the driver at the beginning . . . "

CIC to pay interest would be filed with the Court on November 1, 2002. Therefore, it was no coincidence when on November 1, 2002, one of the Hofmeisters' judgment creditors, Allied Capital, moved to intervene in the case to assert its judgment lien that exceeded $1 million. Murner admitted in his testimony before the jury that someone from his office had contacted the attorney for Allied Capital. CIC Supervisor Walsh listened to this testimony and was asked if he stood behind Murner in the way Murner handled the case with George and Kay Hofmeister, and Walsh responded by saying, "Yes."

CIC moved in post-judgment motions for the court to reduce the punitive damages so that there would be a 1-to-1 ratio between compensatory damages and punitive damages awarded. The court sustained the motion and an appeal by CIC followed. In its appellate Brief, CIC states:

> Unless specified otherwise, the issues raised herein were preserved by motions for summary judgment, R2587-3071 & 3314-61, motions for directed verdict, TR VI 3-47 & TR VII 6-67, and post-trial motions. R 3715-66.

The Hofmeisters moved to strike the appellate brief for violation of CR 76.12(4)(c)(v) that requires a party to show where the issue was properly preserved for review and in what manner. KRE 103 requires CIC to state the objection or the motion in limine ruling it relies upon for preservation of a particular error. Despite the Hofmeisters' reliance on Kentucky common law that mandates "that an appellate brief's contents must contain at the beginning of **each argument** a reference to the record showing whether

the issue was preserved for review and in what manner . . . ," CIC characterized the holding as *obiter dictum*.[14] (Emphasis added). Thus, CIC passed on the opportunity to correct the defect in its Reply Brief.

CIC failed to preserve the vast majority of the alleged errors that it relied on for its appeal. For example, CIC listed all four of the attorneys (including Golden) involved in the underlying tort claim as witnesses for the bad faith claim. CIC **failed** to preserve a single objection to litigation conduct. CIC's strategic decision not to object to litigation conduct during trial allowed it to advance its case through its star witness, Murner, while hoping Murner's testimony would result in a jury verdict on behalf of CIC. Since the jury verdict went against CIC, it attempts to rely upon the litigation conduct it created and relied on as a basis for reversal by the Kentucky Court of Appeals.

QUESTIONS OF LAW INVOLVED

1. As set forth in the Court of Appeals Opinion, "[w]hat legal relationship exists between an insurer and legal counsel hired to defend its insured? Surprisingly, Kentucky has never addressed this question squarely, but the answer is crucial to resolution of this case."[15]

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[14] *See* Massie v. Persson, 729 S.W.2d 448, 452 (Ky.App. 1987) (overruled on other grounds), *see also* Kuhlman Elec. Corp. v. Chappell, 2005 Ky.App. LEXIS 252 (2005) at page 9 (when a violation is brought to the offending party's attention, the defect can be cured in its reply brief).

[15] October 17, 2008 Court of Appeals Opinion at p. 33.

2. Is the relationship of an insurance company with its defense counsel hired to defend its insured, that of an independent contractor, agent or otherwise, and what is that relationship when the attorney conducts the settlement negotiations on behalf of the insurance company?

3. Can a party preserve all objections by a general reference to motions for summary judgment, motions for directed verdict and post-trial motions; or must a party comply with KRE 103 and make an objection or preserve the error by a motion *in limine*, and cite the record to the place where the error was preserved?

4. Did CIC "open the door" to litigation conduct by naming all four of the attorneys to the underlying tort claim on its Witness List and allowing Murner to testify without objection? Also, can CIC delegate its non-delegable duties under the UCSPA?[16]

5. Are objections to jury instructions preserved pursuant to CR 51(3) when the first objection to the jury instructions on the record appears immediately after the trial transcript indicates that the jury had already left for deliberations?[17]

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[16] *See* Hamilton v. Buttery, 220 S.W.3d 287, 291 (Ky App. 2007).

[17] *See* TR. VII, p. 152.

6. Was Murner CIC's agent for settlement purposes?

7. Did the Court of Appeals err in finding that the trial court should have entered a directed verdict in favor of CIC on the claim of violations of the UCSPA and the issue of fraudulent misrepresentation?

8. Whether the Court of Appeals erred in its ruling that the jury's verdict was affected by the cumulative effect of Plaintiffs' counsel's behavior.

9. Whether the Court of Appeals erred in its ruling that the Hofmeisters failed to prove economic loss caused by CIC?

10. If an insurance company increases its reserve to $1 million on June 9, 2000 because it finds that an employee was acting within the scope of his employment with the insured employer, and waits almost 2-½ years to offer the $1 million limits, is the trial court's decision to uphold the bad faith verdict on motion for directed verdict clearly erroneous or palpably or flagrantly against the evidence?

11. Is it appropriate for the Court of Appeals to resurrect, analyze, argue, and use issues that were decided by the trial court in its September 13, 2002 summary judgment order, an order that was never appealed, to create a reasonable basis for the delay in CIC's payment of its limits to Hofmeister?

12. Is a 1.8 ratio of compensatory to punitive damages sufficiently high to warrant a reduction in punitive damages?

13. In the Hofmeisters' claim, was it appropriate for the trial judge to disallow any jury instructions for future economic harm?

14. Is it still the law in Kentucky that when a fraud has been perpetrated to induce a party to enter into a contract, that the injured party may elect to affirm the contract and recover damages in tort, or disaffirm the contract and recover the consideration with which he has parted?

15. Are Kentucky citizens, such as George Hofmeister, injured in a motor vehicle collision, third-party beneficiaries to the insurance contract between the tortfeasor and its insurance company, thereby creating rights by operation of law pursuant to Central Mut. Ins. Co. v. Pippen[18]?

16. Can an attorney step outside the bounds of being an independent contractor for purposes of establishing liability against an insurance company and can an attorney opine that an employee is acting within the scope of the employee's employment and then file a cross-claim against that same employee with the insurance company having full knowledge of the conduct and the insurance company avoid liability?

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[18] Central Mut. Ins. Co. v. Pippen, 111 S.W.2d 425 (Ky.App. 1937).

17. Can CIC successfully secret documents exchanged between CIC and Murner by claiming that those documents are subject to the attorney-client privilege or is CIC now judicially estopped from claiming that Murner was not CIC's attorney/agent?[19]

18. Did Murner have implied, apparent or ostensible authority in dealing with the Hofmeisters to the extent that the Hofmeisters would suffer a loss were CIC allowed to escape from the consequences of a situation which it caused or permitted?[20]

19. Does CIC have independent non-delegable duties under the UCSPA or, in the alternative, is CIC responsible for Murner's settlement offers pursuant to Restatement (Second) of Agency, §§ 251(a) and 255?[21]

20. Because it is undisputed that CIC's $500,000.00 offer went to $1 million within five minutes, is the trial court's decision to uphold the bad faith

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[19] The Court of Appeals incorrectly found that judicial estoppel only applies to a position inconsistent with one successfully asserted in a prior proceeding. However, "[j]udicial estoppel is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent, conflicts with, or is contrary to one that she has previously asserted in the **same** or in a previous proceeding; . . . " *See* 28 Am.Jur.2d Estoppel and Waiver § 74. (Emphasis added).

[20] Clark v. Burden, 917 S.W.2d 574, 576 (Ky. 1996).

[21] *See* Williams v. Kentucky Dept. of Educ., 113 S.W.3d 145, 151 (Ky. 2003).

verdict on motion for directed verdict clearly erroneous or palpably or flagrantly against the evidence?

21. Is a jury trial still available for claims under the UCSPA?[22]

REASONS THE OPINION AND ORDER SHOULD BE REVIEWED

(1) This is a record bad faith verdict that resulted in a 78-page Opinion. Because of the publicity surrounding this case, it has garnered attention from not only the plaintiff and defendant's bar, but the entire insurance industry as well. This Court should clarify whether a tripartite relationship exists between the insured, the insured's counsel, and the insurance company with fiduciary duties flowing throughout. With the fiduciary duties, a claim that would otherwise be a contract claim becomes a tort claim with punitive damages. The UCSPA provides the vehicle for third-party claimants to assert a claim for bad faith. As admitted by the Court of Appeals, it is an unsettled question in Kentucky as to what legal relationship exists between an insurer and legal counsel hired to defend its insured. This issue is complicated by ethical considerations, agent vs. independent contractor issues, and fiduciary relationships. Whether the attorney or the insurance company must investigate, evaluate, and negotiate claims and whether those duties are non-delegable

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[22] *See* October 17,2008 Opinion at page 64.

duties under the UCSPA (KRS 304.12-230) are now called into question.

(2) This Opinion stands in stark contrast to Hamilton Mut. Ins. Co. v. Buttery[23] and raises additional issues that need to be clarified in light of Knotts v. Zurich Ins. Co.[24] This Court should accept review to clarify the issue of non-delegable duties created by the UCSPA and the role and responsibility of the attorney hired by the insurance company to defend the insured.

(3) This Opinion states that, "[w]hether a tort has occurred under KRS 304.12-230 is precisely what *Wittmer* requires of the trial court, not the jury, to decide."[25] Thus, it is unclear whether the right to a jury trial still exists for a violation of the UCSPA.

(4) Perhaps because this case involves such a large verdict, the Court of Appeals deviated from the enforcement of Civil Rules applicable to other litigants. Review should be taken because CIC failed to preserve errors pursuant to KRE 103, CR 76.12(4)(c)(v), and CR 51(3).

(5) Is an order of the trial court reducing punitive damages award from a 1.8 ratio to a 1.1 ratio required in this case?

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[23] Hamilton Mut. Ins. Co. v. Buttery, 220 S.W.3d 287 (Ky App. 2007).

[24] Knotts v. Zurich Ins. Co., 197 S.W.3d 512 (Ky. 2006).

[25] *See* October 17, 2008 Opinion at page 64.

(6) Can the trial court preclude a jury instruction on future economic harm?

(7) Is it appropriate for the Court of Appeals to overturn the trial court's rulings on directed verdict on the issue of fraud and violation of the UCSPA? More specifically, with CIC's Kim Gipson finding no coverage issues and liability clear; Michael Major and attorney Murner finding a dec action was necessary; Julie Sullivan increasing the reserve to $1 million because Clark was within the scope of his employment; CIC's expert, Carl Sumner, finding no justification for the increases in the settlement offers; the trial court's entry of summary judgment on the scope of employment issue under Steelvest standard; and the excess carrier's threat against CIC for its mishandling of the claim regarding its failure to extend a defense to the driver who was in the scope of his employment; in light of all this evidence, was the Court of Appeals correct in its finding that the trial court's decision was clearly erroneous or palpably or flagrantly against the evidence?

(8) For unknown reasons, this case created extreme animosity on the part of two justices on the Court of Appeals. The two justices implicitly accused attorney Golden of extortion.[26] The Hofmeisters waited four years and four months

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[26] *See* September 26, 2008 Opinion at page 71. The Hofmeisters then filed a motion to redact the inappropriate comments and the Court of Appeals sustained the motion and entered a subsequent modified Opinion on October 17, 2008.

from the date of the jury verdict until the Court of Appeals published its Opinion. The Hofmeisters are concerned about the unorthodox circumstances surrounding the Court of Appeals Opinion. There are several factual inaccuracies, such as the one demonstrated on page 5 of this motion, as well as incorrect interpretations of the law, as set forth in footnote 19 of this motion. Page limitations prohibit the recitation of all the inaccuracies; however, the Hofmeisters have accurately set forth the facts and law that are applicable to this case in their appellate brief and would appreciate review of their matter by the state's highest court.

(e)–(f) Neither the Movants nor any other party to this proceeding has a Petition for Rehearing or Motion for Reconsideration pending in the Court of Appeals.

WHEREFORE, the Movants respectfully request that their Motion for Discretionary Review be granted.

Respectfully submitted,

GOLDEN & WALTERS, PLLC

/s/_____

J. Dale Golden
Corporate Plaza
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
Telephone: (859) 219-9090
Facsimile: (859) 219-9292
COUNSEL FOR MOVANTS,
GEORGE and KAY HOFMEISTER

APPENDIX E

SUPREME COURT OF KENTUCKY

2008-SC-0828-D
(2004-CA-2296 & 2004-CA-2362)

[Filed May 13, 2009]

GEORGE HOFMEISTER, ET AL.	)
	)
MOVANTS	)
	)
V.	)
	)
CINCINNATI INSURANCE COMPANY	)
	)
RESPONDENT	)
	)

SCOTT CIRCUIT COURT
2000-CI-0030

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

Scott, J., would grant discretionary review.

ENTERED: May 13, 2009

/s/
CHIEF JUSTICE

APPENDIX F

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2004-CA-002296-MR
AND
NO. 2004-CA-02362-MR

[Dated September 6, 2005]

CINCINNATI INSURANCE COMPANY APPELLANT/CROSS-APPELLEE	)
V.	)
GEORGE HOFMEISTER, ET AL. APPELLEES/CROSS-APPELLANTS	)

APPEAL FROM THE SCOTT CIRCUIT COURT
ACTION NO. 00-CI-00030

BRIEF FOR APPELLANT/CROSS-APPELLEE

SUBMITTED BY:

Hon. Michael D. Risley
STITES & HARBISON
400 West Market Street
Suite 1800
Louisville, KY 40202
(502) 587-3400

Hon. John T. Ballantine
OGDEN, NEWELL & WELCH
500 West Jefferson Street
Suite 1700
Louisville, KY 40202-2874
(502) 582-1601

Hon. Ronald L. Green
BOEHL, STOPHER & GRAVES
444 West Second Street
Lexington, KY 40507
(859) 252-6721

* * *

[Certificate of Service omitted in printing of this appendix]

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[p.6]

[Unless specified otherwise, the issues raised herein were preserved by motions for summary judgment, R 2587-3071 & 3314-61, motions for directed verdict, TR VI 3-47 & TR VII 6-67, and post trial motions. R 3715-66]

At the time of the trial of this action the pleadings set forth three causes of action: 1) violations of the Unfair Claims Settlement Practices Act [hereinafter UCSPA]; 2) fraud; and 3) intentional infliction of emotional distress. The jury found for the Hofmeisters on the first two theories, but there is no way to know which UCSPA provisions the jury thought were violated or whether they were critical of the conduct of CI or Dasher's attorney, Murner. Thus, error as to any of the claims is error as to all of the claims for purposes of the remedy on appeal. Further, while the trial Court declined to dismiss the claims on the ground that litigation conduct was not actionable, the trial Court did acknowledge that if this Court's

decision in *Knotts v. Zurich Insurance Company*, __ S.W.3d __, 2002-CA-00184-MR (2003) becomes final then "Defendant's motion [for summary judgment] is well-taken." R 3590 at 3591. The *Knotts* case is presently pending before the Kentucky Supreme Court.

I. THE TRIAL COURT ERRED IN THE APPLICATION OF AGENCY LAW TO THE FACTS OF THIS CASE.

At the very heart of the claims considered by the jury below is the question of CI liability for the acts or omissions of Dasher's attorney, Murner, assuming his conduct to have been tortious. It was the ruling of the trial court that Murner was the agent of CI insofar as settlement is concerned but not as to litigation conduct. TR VII 75-79. Nonetheless, the instructions are permeated by not only an assumption of agency but also strict liability on the part of CI for the acts of Murner.

A. THE TRIAL COURT ERRED IN HOLDING [p.7] AND INSTRUCTING THE JURY THAT DEFENSE COUNSEL IS THE AGENT OF THE INSURER.

The trial court repeatedly and erroneously instructed the jury that Murner was an agent of CI. The following excerpts[6] illustrate this fact:

> INSTRUCTION NO. 2: Cincinnati Insurance Company ***and/or its agent, Dan Murner,*** . . . (a) ***Attorney Murner, as an agent*** of Cincinnati Insurance Company, . . . OR (b) Cincinnati Insurance Company ***and/or its agent, Dan Murner***, . . .
>
> INSTRUCTION NO. 3: (a) . . . ***making Dan Murner an agent*** for Cincinnati Insurance Company; . . .
>
> INSTRUCTION NO. 4: . . .(a) That the conduct of the Defendant, Cincinnati Insurance Company, ***and/or through its agent, Dan Murner*** . . .
>
> INSTRUCTION NO. 6. PUNITIVE DAMAGES: . . . In determining the amount, if any, of punitive damages, you shall consider the following: (a) . . . the conduct of Cincinnati Insurance Company ***and/or its agents*** AND (b) . . . the conduct of Cincinnati Insurance Company ***and/or its agents*** . . .

By so decreeing, the trial Court was telling the jury that, as a matter of law, Murner was subject to "the fiduciary relation which results from the manifestation

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[6] The full text of these instructions, and of others relevant to this appeal is in the Appendix at Tab 1 as an exhibit to the June 1, 2004 judgment

of consent by one person to another that the other ***shall act on his behalf and subject to his control***, and consent by the other so to act." *McAlister v. Woodford*, 365 S.W.2d 317, 319 (Ky. 1962)(emphasis added). A lawyer, however, may not consent to act on behalf of the insurer or subject to its control. SCR 3.130(1.8)(f)(2). Further, such control, by its very nature, is inimical to the preservation of the defense bar's "duty of loyalty and zealous representation to the insured client alone." See *American Continental Ins. Co.*, *supra* at 13-14. ***The ruling of the trial Court in effect made the very existence of retained counsel unethical in the insurance defense context.***

[p.8] The trial Court's imposition of an agency relationship onto Murner and CI occurred in the face of a solid line of Kentucky cases, and Kentucky Ethics Opinions (SCR 3.130(1) *et. seq.* and SCR 3.530), which, for decades, have held that an attorney retained on behalf of an insured-defendant has his or her attorney-client relationship with the defendant - not with the insurer. There is no question that CI was the insurer of Dasher and, throughout the course of the litigation through settlement, Murner was retained by CI to be Dasher's attorney and this relationship carried with it the ethical obligations of that attorney-client relationship as to Dasher. Under SCR 1.040(5), therefore, the trial Court committed reversible errors of law in directing the jury that Murner ***was*** the agent of CI.

The Kentucky Courts have consistently recognized that an attorney retained by an insurer has one client, the insured. In *American Ins. Assoc. v. Kentucky Bar Assoc.*, 917 S.W.2d 568 (Ky. 1996), the insurance industry challenged Ethics Opinion KBA E-368,

arguing that a "flat fee" agreement between an insurer and defense counsel was permitted because Kentucky's Rules of Professional Conduct did not expressly prevent such arrangements. The Kentucky Supreme Court, however, approved KBA E-368 (1994), holding that the attorney's duty was a function of the attorney-client relationship, and that the nature of "flat fee" agreements interfered with the attorney's exercise of independent professional judgment. *Id.* at 569, 572.

Later, a panel of this Court held that excess insurers could not pursue legal malpractice claims against counsel retained by the primary insurer. *American Continental Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12 (Ky.App. 1999). This Court was "convinced that adopting such a rule [allowing such a malpractice claim] would be inimical to the preservation of traditional and longstanding concepts associated with attorney-client [p.9] relationship (sic), as recognized by Kentucky law." *Id.* at 13. Recognizing its "duty to protect and preserve this relationship for the benefit of the general public," *Id.* at 13, this Court concluded that allowing such a claim "would be tantamount to saying that insurance defense attorneys do not owe their duty of loyalty and zealous representation to the insured client alone," quoting from *American Employers ' Ins. Co. v. Medical Protective Co.*, 419 N.W.2d 447, 448-49 (Mich.App. 1987) and *American Continental Ins. Co., supra* at 14. This Court went on to say, "We are particularly persuaded by this analysis because it is consistent with our clearly-defined duty to protect, encourage, and preserve the traditional attorney-client relationship." *Id.* at 14.

Also, in the last nearly two-plus decades the Kentucky Bar Association has repeatedly rendered Advisory Ethics Opinions that counsel retained by an insurer has one client: the insured. KBA E-416 (2001): "In Kentucky ... when an insurance company engages a lawyer to defend an insured against a claim, the insured - not the insurer - is the lawyer's client. ... Under the one-client view the insurer is a third-party payer, not a client...." KBA E-410 (1999): "The contract of insurance does not, however, define the ethical duties an attorney hired by an Insurer to defend an Insured owes to the client Insured. KBA E-378 (1995): "We begin with a restatement of the firm view we have expressed many times in the past. Defense counsel represents the insured, not the insurer." KBA E-368 (1994): Unanimously approved by Supreme Court in *American Insurance Association*, *supra*: "Furthermore we start with the proposition that the lawyer's duty to the insured client arises from the attorney-client relationship. It is not governed or limited by the terms of the insurance contract." KBA E-331 (1988): "We only wish to emphasis (sic) that the insured is defense counsel's client and that counsel owes professional obligations to his or her client that flow from the attorney-client [p.10] relationship and are not bounded by the "hardboiled commercial" relationship between the insured and the insurer." These opinions had their roots in the 1971 Kentucky Code of Professional Responsibility (DRE-107(B) followed by the 1990 Rules of Professional Conduct 5.4(c)).

The record clearly shows that Murner, as Dasher's counsel, exercised substantial independence in the conduct of the defense and settlement of the accident case. There is no evidence that CI at any time declined to provide whatever authority Murner asked for. In

fact, it is uncontroverted that, when Murner became concerned for various reasons and asked for increased settlement authority far in excess of CI's opinion of the value of the alleged damages, Mr. Walsh of CI permitted Murner to settle for the policy limits. The facts belie any notion of subservience of Murner to CI, and instead show two entities working together for the good of their respective principal, Dasher. TR III 68-71. In fact, Mr. Walsh agreed with Mr. Golden's assertion that it was Murner who had the right to control the case. TR V 46. The trial Court clearly erred in holding and instructing the jury that Mumer was the agent of CI.

B. EVEN IF MURNER WAS CI'S AGENT FOR PURPOSES OF SETTLEMENT, VICARIOUS LIABILITY DOES NOT APPLY AND CONSTRUCTIVE KNOWLEDGE WILL NOT SUPPORT A CLAIM FOR FRAUD OR "BAD FAITH".

Even if Murner was the agent of CI for settlement purposes, the trial court erred in instructing the jury that, in effect, an agency relationship translates into vicarious liability. In Instruction No. 2, the jury was given the option of finding that either CI or Murner, as agent, violated the UCSPA. In Instruction No. 3, the trial court instructed on a test for scope [p.11] of employment, erroneously equating this to a test for agency. This again allowed the jury to find CI guilty of a fraud based on respondeat superior, without any requirement that CI even knew that a representation had been made. If Murner was an agent of CI, he was

likewise an independent contractor[7] whose torts cannot be imputed to the principal. Accordingly, a finding of "agency" for any purpose, including settlement, does not justify the imposition of tort liability on the "principal" as was ruled in the trial below.

Further, a finding of agency would not have supported a claim against CI under either a fraud or a UCSPA theory, even if the law of agency had been properly applied. In this record, there is no evidence that CI had any knowledge that there had been any discussions between Golden and Murner as to the amounts of coverage available. It is those discussions which form the factual predicate for the fraud claim, and for the UCSPA claim based on subsection (1). Since both of these claims require a culpable state of mind on the part of CI, the trial court should have directed a verdict for CI on these claims.

Under Instruction No. 2, the jury was told that the law required "[t]hat such conduct was carried out with an evil motive on the part of Cincinnati Insurance

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[7] In *American Ins. Assoc. v. Kentucky Bar Assoc.*, 917 S.W. 2d 568 (Ky. 1996) the Kentucky Supreme Court observed:

> One such cost-cutting measure, referenced in the "Background" section of E-368 and more fully discussed in U-36, involved the practice of insurers to attempt to provide defense services directly through salaried attorney employees-a practice, the Board concluded, that "is not permitted in Kentucky, for in addition to the obvious conflicts of interest that would be presented by such an arrangement, the practice would violate the law governing unauthorized practice."

Id. at 570. Thus, by definition independent counsel retained to defend an insured cannot be an employee.

Company or with reckless indifference. . .". To find fraud under Instruction No. 3, the jury was required to believe that "[t]he representation was made with knowledge of its falsity or recklessly [p.12] without any knowledge of its truth." Thus the instructions of the trial court make clear that an essential element of each cause of action involves the state of mind of CI.

While this presents an issue of first impression in Kentucky, the Restatement of Agency makes it clear that imputed knowledge can have no such effect. In comment d to Restatement (Second) Agency § 268 the Commissioners noted:

> If the state of mind of a principal in a transaction is a factor, a notification by a third person giving information to an agent who does not communicate it to the principal does not operate with like effect as a similar notification given to the principal.

The comments refer to privileges and deceit where "the motive and knowledge with which an act is done is a factor in the existence of a cause of action." This principle has also been held to preclude the imputation of such knowledge for bad faith, which must be determined on the basis of facts which are actually known. 3 Am.Jur.2d, Agency § 281, citing *Harte v. United Ben. Life Ins. Co.*, 424 P.2d 329 (Cal.App. 1967).

The mere fact that the jury was allowed to find against CI based on conduct of which it had no actual knowledge requires a reversal on the fraud and UCSPA § (1) claims, with directions to dismiss those claims against CI.

C. THE TRIAL COURT MISAPPLIED ITS OWN RULING AS TO MURNER'S REPRESENTATIONS CONCERNING COVERAGE.

As noted above, the trial court's ruling concerning "agency" was limited to matters of settlement. TR VII 75-79. The fact is that a third party insurer has no duty of any kind to disclose the terms of an insurance contract to a plaintiff. *Wheeler v. Creekmore*, 469 S.W.2d 559 (Ky. 1971). The Civil Rules specifically provide that a party in litigation may obtain this information from another party using written discovery. C.R. 26.02(2). Even though the [p.13] Hofmeisters never properly requested information concerning coverage, any discussion of coverage was part and parcel of the defense of Dasher and on Dasher's behalf, which, under the trial Court's own instruction, was not within the agency ruling. Even if it is assumed *arguendo* that the record supports a finding of a material misrepresentation by Murner, there is no legal basis for imposing liability on CI based on the trial Court's own rationale. For this additional reason, CI was entitled to a directed verdict.

II. THE TRIAL COURT ERRED IN SUBMITTING THE FRAUD ALLEGATIONS TO THE JURY.

The trial Court erred in denying the motion for directed verdict by CI since the record is devoid of any evidence to meet any of the essential elements of the tort of fraud. To sustain this cause of action, the Hofmeisters had the duty to prove CI (a) made a material representation, (b) which was false, (c) which

was known to be false or made recklessly, (d) which was made with inducement to be acted upon (e) which plaintiff acted in reliance upon, and (f) which caused plaintiff injury. *U.P.S. Co. v. Rickert*, 996 S.W.2d 464 (Ky. 1999).

The Appellees' claims are based on a letter dated May 18, 2000 from Murner to Golden responding to the Hofmeister's demand of $1.5 million advising of the need for more information and in which Murner wrote:

> Given your client's large demand in excess of the policy limits provided by Dasher's insurance carrier, I will need more time to evaluate your client's claim. I believe it is unfair for your client to expect Dasher and its carrier to pay large sums to your client without the benefit of an adequate review of the claim. Blind faith is a lot to ask in this case.

PX 11. This was nearly two and a half years before the settlement of the case. The following elements of a claim for fraud[8] are missing:

MATERIAL REPRESENTATION - The amount of insurance available is not

* * *

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[8] The element of damage is treated separately in argument IV.

APPENDIX G

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2004-CA-002296-MR
AND
NO. 2004-CA-02362-MR

[Dated January 18, 2006]

CINCINNATI INSURANCE COMPANY APPELLANT/CROSS-APPELLEE	)
VS.	)
GEORGE HOFMEISTER, and KAY HOFMEISTER, HIS WIFE APPELLEES/CROSS-APPELLANTS	)

APPEAL FROM THE SCOTT CIRCUIT COURT
CIVIL ACTION NO. 00-CI-00030

COMBINED RESPONSE BRIEF AND
CROSS-APPEAL FOR
APPELLEES/CROSS-APPELLANTS
GEORGE HOFMEISTER AND
KAY HOFMEISTER

* * *

[Certificate of Service omitted in printing of this appendix]

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* * *

[p.14] showing whether the issue was properly preserved. Massie v. Persson, 729 S.W.2d 448, 452 (Ky.App. 1987).

CI cannot rely upon a prior motion for summary judgment or subsequent post-trial motion to raise an error for the first time. *See* Ellison v. R & B Contracting, Inc., 32 S.W.3d 66, 73 (Ky. 2000) (holding errors raised for the first time in a post-trial motion are not preserved for appeal). Pursuant to CR 76.12(8)(a), the Appellees respectfully request the Court to strike the Appellant's brief for failure to comply with the requirements of Rule 76.12.

B. CI Is Estopped From Arguing Murner Was Not Its Agent.

CI successfully prevented the Hofmeisters from discovering documents containing communications between Murner and CI by asserting the attorney-client privilege. In fact, when CI produced the documents for an in camera inspection for the Court, it entitled them "Notice of Delivery of Documents Protected by the Attorney-Client Privilege" (R. 14, p. 1866). By successfully asserting the attorney-client privilege and preventing the disclosure of some of the documents, CI is now judiciously estopped from arguing that Murner was not its agent.

In Colston Investment Co. and Colston Commercial Properties, Inc. v. Home Supply Co., 74 S.W.3d 759, 763 (Ky. App. 2001), this Court explained:

> The judicial estoppel doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. . . . The "prior success" requirement does not mean that the party against whom the judicial estopppel doctrine is to be invoked must have prevailed on the merits . . . judicial acceptance means only that the first court has adopted the position urged by the party. (Quoting Reynolds v. Commissioner, 861 F.2d 469, 472-73 (6th Cir. 1988).)

[p.15] After CI successfully argued that the attorney-client privilege precluded the disclosure of all communications between Murner and CI, it foreclosed any future argument that Murner was not its agent. CI has not bothered to preserve as error the trial court's decision to disclose those communications between Murner and CI that dealt with settlement issues. Therefore, CI has waived the trial court's ruling that Murner was CI's agent for the purposes of settlement negotiations. In any event, it is inequitable to allow CI to conceal communications between Murner and CI based on the attorney-client privilege and then allow CI to claim that no agency relationship existed between the two. CI cannot have it both ways.

C. Attorneys Act As Agents For Insurers For Purposes Of Settlement.

Murner was an agent of CI for purposes of settlement because he had actual and/or apparent authority to bind CI to a settlement agreement. Actual authority is "the power of the agent to effect the legal

relations of the principals by acts done in accordance with the principal's manifestations of consent to him." Restatement (Second) of Agency, § 7. Alternatively, apparent authority is "the power to effect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." Restatement (Second) of Agency, § 8.

The court in Union Central Life Ins. Co. v. Glasscock, 270 Ky. 750, 757, 110 S.W.2d 681, 685 (Ky. 1937), approvingly quoted from the Restatement of Law of Agency, § 49, cmt. B, explaining apparent authority, as follows:

> Acts are interpreted in the light of ordinary human experience. If the principal puts one into, or knowingly permits him to occupy, a position in which, according to the ordinary experience and habits of mankind, it is [p.16] usual for the occupant to have authority of a particular kind, anyone having occasion to deal with one in that position is justified in inferring that the person in question possesses such authority, unless the contrary is then made known.

Because Murner could bind CI to a settlement agreement, a discussion of whether he was a servant of CI or an independent contractor is irrelevant. The only critical determination is whether an agency relationship exists; the type of agency is inconsequential. Because Murner was an agent of CI for purposes of settlement, any misrepresentations he made in settlement negotiations subject CI to liability.

Restatement (Second) of Agency, §§ 249, 257, 261, and 265.

The pertinent portions of the relevant sections of the Restatement are set forth as follows:

§ 249. Misrepresentations

A master is subject to liability for the misrepresentations of a servant causing pecuniary loss as he is for the misrepresentations of an agent who is not a servant.

§ 257. Misrepresentations; in General

A principal is subject to liability for loss caused to another by the other's reliance upon a tortious representation of a servant or other agent, if the representation is:

(a) authorized;
(b) apparently authorized; or
(c) within the power of the agent to make for the principal.

§ 261. Agent's Position Enables Him to Deceive

A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud.

§ 265. General Rule

(1) A master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority.

These sections establish that when an agent has apparent authority to act, liability may be based on that apparent authority, and there is no requirement the agent act within the scope of his employment. E.A. Prince & Son, Inc. v. Selective Ins. Co. of the Southeast, 818 F.Supp. 910, 914-15 (D.S.C. 1993) (citing Restatement (Second) of Agency, § 261, cmt. a (1958); Restatement (Second) of Agency, § 257, cmt. a. (1958)) [App. 191. Liability for conduct apparently authorized depends upon agency law, not the theory of respondeat superior. Id. The rule is simple; if a principal puts an agent in a position which enables the agent, while apparently acting within his authority, to commit a tort, the principal is liable for the tort. Id. The principal is liable even if the principal is entirely innocent and has received no benefit from the transaction. Id. Therefore, the principal has an incentive to hire scrupulous attorneys and ensure the legitimacy of settlement negotiations. Thus, CI cannot benefit from fraud.

The Restatement (Second) of Agency § 267, was adopted in Williams v. St. Claire Medical Center, 657 S.W.2d 590, 595-96 (Ky.App. 1983), which provides:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill

> of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

The Hofmeisters proved liability pursuant to Restatement (Second) of Agency, § 265(1) by proving the following:

(1) Murner misrepresented facts;

(2) The Hofmeisters relied upon Murner's misrepresentations; and

(3) Murner had apparent authority from CI to settle the case.

Because Murner was CI's agent for purposes of settlement negotiations, there is no requirement to prove that Murner's misrepresentations advanced the cause of CI. Even so, the Hofmeisters went above and beyond the proof required by showing fraud on the part of Murner by clear and convincing evidence. The only requirement of the Hofmeisters under the law was to prove that Murner had apparent authority, a fact that is still undisputed. In its brief, CI states:

> There is no evidence that CI at any time declined to provide whatever authority Murner asked for. In fact, it is uncontroverted that, when Murner became concerned for various reasons and asked for increased settlement authority far in excess of CI's opinion of the value of the alleged damages, Mr. Walsh of CI

> **permitted Murner** to settle for the policy limits. (Emphasis added).

(CI brief at p. 10).

The admission by CI that Murner was granted authority by it to settle the case is conclusive on the issue of actual and/or apparent authority.

D. CI Is Liable For The Conduct Of Murner.

CI cannot hide behind Murner in a first-party bad faith claim as recognized by Curry v. Fireman's Ins. Co., 784 S.W.2d 176, 178 (Ky. 1989), nor can it do so regarding KRS 304.12-230, "the UCSPA." If CI were completely insulated from liability because it hired Murner, then Kentucky would not recognize common law first-party bad faith. After all, the excess verdict that commonly sparks a first-party bad faith claim is the result of a trial conducted exclusively by an attorney hired by the insurance company. Also, because the UCSPA recognizes third-party bad faith, it should not matter whether the conduct of the insurance company occurs pre- or post-litigation. The injury is the same.

Although the Hofmeisters are asking this Court to recognize that Murner was CI's agent for purposes of settlement negotiation, a majority of states go a step further and recognize an agency relationship in matters outside a settlement. Rose v. St. Paul Fire and Marine Ins. Co., 599 S.E.2d 673, 684 (W.Va. 2004) (Davis, J., concurring)(explains a majority of courts hold an insurer liable for defense counsels misconduct and provides specific cites for the states which have adopted such a position) [App. 201]. The Hofmeisters

are entitled to the protection afforded by the majority of the states. Even if Kentucky adopts a minority position, the agency relationship between Murner and CI in regard to the settlement negotiations is enough to impose liability against CI. It is axiomatic that an attorney has the actual, or at least the apparent, authority to bind an insurer in regards to settlement.

E. CI Is Liable For Murner's Conduct Even If Murner Is An Independent Contractor.

Even though Kentucky courts draw freely from the common law and restatement of the law in developing both tort and agency doctrine, if this court determines §§ 249, 257, 261, and 265 of the Restatement (Second) of Agency should not be followed, CI would still not evade responsibility for Murner's misrepresentations. This is true whether Murner was an employee or an independent contractor.

In Williams v. Kentucky Dept. of Educ., 113 S.W.3d 145, 151 (Ky. 2003), the Supreme Court of Kentucky explained:

> [W]hen the principal is under a duty to provide protection for or to have care used to protect others and confides the performance of that duty to a servant or other person who causes harm to them by failing to perform that duty, vicarious liability attaches even if the agent or subagent is not a servant, i.e., is an independent contractor. (Citing Restatement (Second) of Agency, §§ 251(a) and 255.)

Thus, the only issue is whether Kentucky requires insurance companies to negotiate settlements in good faith.

F. Murner's Misrepresentation Regarding Coverage Was Fraudulent.

Liability for Murner's fraudulent misrepresentations is not dependent upon the Hofmeisters tendering interrogatories to Dasher to ensure that each representation is accurate. To the contrary, in Myers v. Monroe, et al., 312 Ky. 110, 115, 226 S. W.2d 782, 785 (Ky. 1950), the court stated, "the defrauding party cannot escape on the ground that the complaining party should not have trusted him, or was negligent in doing so." CI's assertion that a fraudulent misrepresentation is not actionable unless it is followed up by a subsequent interrogatory is nonsensical. Certainly, there should be no policy in Kentucky that allows an attorney to fraudulently misrepresent the truth unless he or she is sent interrogatories.

G. The Hofmeisters Proved By Clear And Convincing Evidence The Elements Of Fraud, A Violation Of The UCSPA, And Also Proved Their Damages.

CI's argument that it was entitled to a directed verdict on the issues of fraud, violation of the UCSPA, and damages is contradicted by the standard of review as set forth in Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 787 (Ky. 2004), which stated as follows:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role

of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight

* * *

APPENDIX H

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2004-CA-002296-MR
AND
NO. 2004-CA-02362-MR

[Dated March 14, 2006]

CINCINNATI INSURANCE COMPANY
APPELLANT/CROSS-APPELLEE

V.

GEORGE HOFMEISTER, ET AL.
APPELLEES/CROSS-APPELLANTS

APPEAL FROM THE SCOTT CIRCUIT COURT
ACTION NO. 00-CI-00030

COMBINED REPLY AND RESPONSE BRIEF ON BEHALF OF THE APPELLANT, CINCINNATI INSURANCE COMPANY

Hon. Michael D. Risley
STITES & HARBISON
400 West Market Street
Suite 1800
Louisville, KY 40202
(502) 587-3400

Hon. John T. Ballantine
OGDEN, NEWELL & WELCH
500 West Jefferson Street
Suite 1700
Louisville, KY 40202-2874
(502) 582-1601

Hon. Ronald L. Green
BOEHL, STOPHER & GRAVES
444 West Second Street
Lexington, KY 40507
(859) 252-6721

BY: /s/_____
HON. RONALD L. GREEN
ATTORNEYS FOR THE APPELLANT,
CINCINNATI INSURANCE COMPANY

* * *

[Certificate of Service omitted in printing of this appendix]

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* * *

[p.3] Section III(A) contains a second frivolous assertion. The Hofmeisters assert that an issue cannot be raised by summary judgment or post trial motions. They cite no authority pertaining to summary judgments. The case cited, *Ellison v. R. & B. Contracting, Inc.*, 32 S.W.3d 66 (Ky. 2000), stands only for the proposition that errors in the instructions cannot be preserved by post-trial motions, which principle has no application here.

III. Agency Issues [Appellant's Brief at 6-13]

In their brief the Hofmeisters did nothing to undercut - or even deal with - the application and validity of the arguments of CI in Part IA of CI's primary brief in which it was demonstrated that Murner was the agent of the individual

defendant/insured -- and was not the agent of CI.[5] This issue is sidestepped by the Hofmeisters despite the overwhelming significance of the trial Court's total destruction of the fundamental nature of the relationship among a defense counsel, counsel's client (the insured) and the client's insurer.[6] If the verdict against CI is sustained and if the instructions of the trial Court are allowed to become the law in Kentucky, the principle that the duty of loyalty of defense counsel is to the defendant-client will have been destroyed. The trial Court has in effect created a cause of action in favor of the party (plaintiff) who was adverse to defense counsel in the underlying case. It will be defense counsel who will ultimately bear the brunt of this new cause of [p.4] action since the insurer held liable for defense counsel's conduct would necessarily be entitled to indemnity from its agent (defense counsel). Such a claim by an adverse party against defense counsel would never be countenanced directly, and the idea that this could be accomplished indirectly through the insurer must be firmly rejected.

The disastrous impact of the trial Court's ruling, however, pales in significance to the public's interest generally, who purchases liability insurance not only to protect themselves from an adverse judgment but also to obtain qualified and independent counsel to represent their interests. The sanctity of the attorney-

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[5] The Hofmeisters do not even address the issues raised in IB and IC and therefore CI relies on its original argument.

[6] The Amicus Curiae Brief on Behalf of The Kentucky Defense Counsel, heretofore filed with leave of this Court, discusses more fully the aspect of the destruction of the lawyer-client relationship which would be caused if the trial Court's instructions are upheld.

client relationship between retained counsel and the client-insured is reflected by SCR 3.130(1.7)(b) which provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities ..., to a third person, or by the lawyer's own interest, ...

The trial Court's ruling totally ignored the clash that a finding of agency caused with (1.7)(b). If that ruling is permitted to stand, no lawyer can ever ethically represent an insured because the lawyer's representation of the insured will be materially limited by the lawyer's responsibilities to the putative principal, the insurer, and would be thereby directly limited "by the lawyer's own interest." The lawyer will necessarily be "looking over his shoulder" to avoid any kind of legal malpractice claims, instead of focusing on the defense of the client. The lawyer who then represents the prior lawyer would then have the same conflicts which the clear ethical rules of the Kentucky Supreme Court prohibit. These legal principles are not challenged in any way by the Hofmeisters[7] and this

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[7] The caption in the Hofmeisters' brief in section III(C) states that "attorneys act as agents for insurers." That caption is then followed by three and one half pages of discussion that fails to even address the issue, i.e. the establishment of a principal agent relationship. Elsewhere in the brief, the Hofmeisters make the statement, unsupported by any citation, that Murner represented CI on coverage and was thus CI's agent. Hofmeisters' brief at pages 4 and 29. This statement is not only false, but had to be known to be false when written. The question of whether Clark was in the scope and course of employment was an issue raised by Murner in the defense of Dasher. The same factual dispute may have been important in any coverage question concerning Clark

issue alone is dispositive and requires [p.5] reversal of the judgment and dismissal of the claims.

In their brief at III(B) the Hofmeisters suggest that CI is estopped from taking the position that there was no agency relationship between CI and Murner because attorney client privilege was invoked with respect to a Hofmeister request for production of documents.[8] If this were impermissible in this context, then the Hofmeisters would be estopped from taking the position that Murner was CI's agent because it argued to the contrary in seeking the discovery, an obviously inane result. But more importantly, the Hofmeisters know full well that the positions referred to are not inconsistent at all.

The Hofmeisters seek solace behind the principles of ostensible agency, citing Restatement (Second) of Agency §267 (1958) and *William v. St. Claire Med. Ctr.*, 657 S.W.2d 590 (Ky.App. 1983). They never explain in their brief how this doctrine could have application for the obvious reason that it does not. There is no evidence that CI ever made any

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under Dasher's policy. Anyone with any experience in insurance defense would know better than to confuse the liability defense with the coverage defense in such a case. Since Golden bragged to the trial Court of his work for insurance companies, see note 8, *infra*, it must be assumed that he knew this was false and simply hoped that the Court might not.

[8] The case cited in support of this notion is *Colston Inv. Co. Home Supply Co.*, 74 S.W.3d 759 (Ky.App. 2001), and that case relates to positions taken in separate and distinct litigation. It does not have anything to do with a party taking alternative positions in the same litigation, which is permitted by CR 8.05(2)." *Smith v. Isaacs*, 777 S.W.2d 912, 915 (Ky. 1989).

representation that Murner was anything but the attorney for the insured, Dasher Express. [p.6] To any attorney experienced in tort litigation,[9] this should be obvious.

The privilege that was asserted and that was at issue in the document referred to by the Hofmeisters, R at 1866, was not CI's privilege, but rather belonged to Dasher. In *Ashbury v. Beerbower*, 589 S.W.2d 216 (Ky. 1979) the Kentucky Supreme Court held that:

> When a person has had an automobile accident that may result in litigation he would normally confide in counsel. If, however, he is insured, ***he has paid an insurance company to exercise that choice for him***. He should not be penalized for his prudence in that respect.

Id. at 217 (emphasis added). The Hofmeisters argued that this was abridged by the Court's decision in *Riggs v. Schroering*, 822 S.W.2d 414 (Ky. 1992), but that case dealt with the work product protections, not attorney client privilege. The Hofmeisters simply do not understand (or refuse to understand) the basic fact, as again expressed by the emphasized portion of the quote just above, that CI and Murner are both the agents of the insured, Dasher; they are not agents of each other.

The argument set forth by the Hofmeisters in III(D) makes no sense, but this may be the result of their use of non-standard terminology. A first party bad faith

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[9] Hofmeisters' counsel represented to the Court that he performed legal work for a number of insurance companies. TR VII at 38.

claim is one brought by an insured under a first party contract. In such a case counsel will be the agent of the insurance company because the insurance company is the client. A third party bad faith action is one brought by an insured under a liability policy for breach of fiduciary duty in the handling of the defense of the insured (the Hofmeisters may be calling this type of action "first party bad faith)." The action is premised not on the relationship between counsel and the insurer, but rather the agency relationship between the insured and insurer. See Justice Cooper's concurrence in *Guaranty National Ins. Co. v. George*, 953 S.W.2d 946, [p.7] 950-51 (Ky. 1997). Neither of these actions have any application here, nor do they illuminate any agency principles involved in this appeal. A third party insurer owes an adverse party such as Hofmeister no duty except that it may be liable for a violation of the KRS 304.12-230, but only if the violation is accompanied by conduct which would justify punitive damages. None of this has anything to do with the application of agency principles to the triparte relationship created by the terms of liability insurance policies.

The Hofmeisters cite a West Virginia case, *Rose v. St. Paul Fire & Mar. Ins. Co.*, 599 S.E.2d 673 (W.Va. 2004)[10], which they erroneously claim holds that defense counsel is the agent of the insurer. Of course, the case at bar is governed by Kentucky law, which is fully set forth in CI's original brief, and other states

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[10] It should be noted that West Virginia has seen the light and abandoned the notion that the UCSPA creates a private cause of action in favor of third party claimants, W.Va. Code § 33-11-4a(a), leaving Kentucky as the last state clinging to this interpretation of the Model Act absent specific legislation.

are free to hold otherwise. The fact is, however, that even in West Virginia defense counsel is not the agent of the insurer.[11] Id. at 680. Even more interesting, the Hofmeisters' claim would fail under the standard adopted by West Virginia in *Rose*. That standard is:

> A claimant can establish a violation of the UTPA by showing that an insurance company, ***through its own actions***, breached its duties under the Act by knowingly encouraging, directing, participating in, relying upon, or ratifying the wrongful litigation conduct of a defense attorney hired by the insurance company to represent an insured.

Id. at 680 (emphasis added). In this case, if we assume that Murner misrepresented the amount of coverage in an actionable way, the uncontroverted evidence is that CI was not [p.8] privy to and had no knowledge of any such discussions, let alone that false statements were made.

In section III(E), once again the Hofmeisters simply misunderstand or misrepresent the law. The case of *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145 (Ky. 2003) has nothing to do with this case. The very quote repeated in their brief makes clear that the principle at issue therein applies where a principal is under a duty to provide protection for others. This is not a negligence case and Murner was not hired to

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[11] The cases referred to in the concurring opinion largely relate to the contractual duty owed by the insurer to provide a defense to the insured and have nothing to do with liability to an adverse party such as the Hofmeisters.

protect the Hofmeisters; in fact it was his sworn duty to try to defend and minimize the Hofmeisters' claim.

IV. The Fraud Issues [Appellant Brief at 13-16]

The theory which the Hofmeisters plead, albeit in tardy fashion, and sought to prove below is a fairly simple one. They claimed that Murner made a representation as to the amount of coverage available which was false, known to be false and on which they asserted reliance. PX 11. This is the theory which was submitted to the jury under the trial Court's instructions. R. at 3629-3638A. CI agrees with the Hofmeisters that a claim for fraud may be proven by circumstantial evidence, but the conclusions advocated by the Hofmeisters are instead speculation and conjecture by counsel. *In Bryan v. Gilpin*, 282 S.W.2d 133 (Ky. 1955) the Court observed:

> [W]e are of the opinion that to entitle a plaintiff to go to the jury on circumstantial evidence the essential proven facts upon which liability can be based must do more than suggest a possibility that the defendant was at fault. While we do not at this time go so far as to declare that circumstantial evidence must exclude all other inferences of non-liability, we believe the evidence must furnish some basis for the jury to decide that the probability of fault preponderates over the probability of innocence.

Id. at 134-35. In a fraud case the plaintiff has the additional burden of producing evidence which must be

clear and convincing. *Goerter v. Shapiro*, 254 Ky. 701, 72 S.W.2d 444 (Ky.

* * *

APPENDIX I

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2004-CA-002296-MR
AND
NO. 2004-CA-02362-MR

[Dated March 23, 2006]

CINCINNATI INSURANCE COMPANY APPELLANT/CROSS-APPELLEE	)
VS.	)
GEORGE HOFMEISTER, and KAY HOFMEISTER, HIS WIFE APPELLEES/CROSS-APPELLANTS	)

APPEAL FROM THE SCOTT CIRCUIT COURT
ACTION NO. 00-CI-00030

REPLY OF APPELLEES/CROSS-APPELLANTS, GEORGE HOFMEISTER AND KAY HOFMEISTER, TO COMBINED REPLY AND RESPONSE BRIEF OF APPELLANT/CROSS-APPELLEE

* * *

[Certificate of Service omitted in printing of this appendix]

[p.4] knowledge of the excess carrier prior to his June 22, 2000 letter failing to disclose that information.

CI's failure to comply with CR 76.12(4)(c)(v) has made the appellate court's job much simpler. Due to the fact that all reasonable inferences must be drawn in favor of the Hofmeisters, the simple fact that they were able to prove fraud and ratification of that fraud by CI by clear and convincing evidence is more than enough evidence to conclude that the trial court did not err when it denied CI's motion for directed verdict at the close of the evidence.

II. <u>CI Is Not Immune From Fraud.</u>

CI goes to great length to argue that the many ethical rules and the attorney-client privilege provide it with complete immunity from fraud. However, CI fails to acknowledge that the finding of fraud indicates a failure to comply with the ethical rules and that simply reciting the ethical rules after the fact is of no benefit to CI at this time. (*See also* KRE 503(d)(1)).

CI retained attorney Murner to represent Dasher against the Hofmeisters and it was CI that stood to benefit from the fraud that was committed. Therefore, it is CI that must now take responsibility for the fraud. The fact that CI, Murner, and the excess carrier, Fireman's Fund, were all working together and in a panic as the trial date neared is evident in PX8, Apx. 14.

CI has never disputed the fact that Murner was advising CI on coverage issues; thereby becoming the direct agent of CI. (*See* second page of Apx. 10). It is also undisputed that CI was directly participating with

and aiding Murner in his wrongful actions (Apx. 11). Therefore, it is clear that CI and Murner opted to [p.5] ignore the ethical rules and engage in a relationship and conduct that was not only unethical but fraudulent as well.

CI made no attempt to refute the Hofmeisters' reliance on Restatement [Second) of Agency, §§ 249, 257, 261, and 265. (Appellees' Combined Brief, p. 16). § 261 states:

> A principal who puts a servant **or other agent** in a position which enables the agent, while **apparently** acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud. (Emphasis added).

It is undeniable that Murner was a servant of CI, given he was paid for his services and acted as coverage counsel. However, even if Murner is not considered a servant, he is undoubtedly an agent. As stated in the Appellee's brief, it is undeniable Murner had at least apparent authority to bind CI with regard to a settlement agreement. (See Appellees' Combined Brief, p. 15). Thus, CI has not ever attempted to argue a contrary position.

Since Murner had at least apparent authority to bind CI to a settlement agreement, CI is responsible for his misrepresentations. The Restatement of Agency mandates such by its plain language.

Respectfully submitted,

GOLDEN & WALTERS, PLLC

/s/ _____

J. Dale Golden
Corporate Plaza
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
Telephone: (859) 219-9090
Facsimile: (859) 219-9292
Counsel for Appellees/Cross-Appellants

APPENDIX J

COMMONWEALTH OF KENTUCKY
SCOTT CIRCUIT COURT
DIVISION II

CASE NO. 00-CI-00030

[Dated October 14, 2002]

GEORGE HOFMEISTER, ET AL PLAINTIFFS	))
VS.	)
EUGENE CLARK, ET AL DEFENDANTS	))

HEARING

APPEARANCES

Hon. Paul F. Isaacs
Judge

Hon. J. Dale Golden
Corporate Plaza
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
Attorney for the Plaintiff

Hon. Guy R. Colson
Fowler, Measle & Bell
300 West Vine Street, Sixth Floor
Lexington, Kentucky 40507-1660
Attorney for Defendant Kentucky Farm Bureau

Jacquelyn J. Hatcher
Official/Freelance Court Reporter
290 Leawood Drive
Frankfort, Kentucky 40601
Phone 502-223-3676

[SEAL]

APPEARANCES
(Cont.)

Hon. Daniel E. Murner
Landrum & Shouse
P.O. Box 951
Lexington, Kentucky 40588-0951
Attorney for Defendant Dasher Express

Hon. Melissa A. Wilson
Clark & Ward
333 West Vine Street, Suite 1100
World Trade Center
Lexington, Kentucky 40507
Attorney for Defendant Eugene Clark

[p.2] Pursuant to notice duly given, the above styled matter came to be heard on October 14, 2002, at approximately 1:00 p.m. in the chambers of Judge Paul F. Isaacs, Scott County Justice Building, Georgetown, Kentucky.

[p.3] THE COURT:

Who wants to go first?

MR. GOLDEN:

Judge, I'll go ahead and go first and kind of--this is Dale Golden on behalf of the Plaintiffs, kind of outline what has occurred in this case. On behalf of the Plaintiffs George and Kay Hofmeister, we have filed suit against Eugene Clark, and also against his employer Dasher. Since that time, Eugene Clark's insurance company Travelers offered $100,000 to resolve the claim against him. I put the UIN carrier on notice, that was Kentucky Farm Bureau. They substituted $100,000 for Eugene Clark, and then we proceeded forward. Now there has been a ruling by the Court that Mr. Clark was acting within the scope of his employment, thereby creating vicarious liability between Eugene Clark and his employer. We're here at trial today at the start of a week long trial. Dasher has offered their limits of a million dollars, however, they are concerned about the $100,000 subrogation claim that Kentucky Farm Bureau has against Eugene Clark. And the way to straighten that out and the way to consummate this settlement is for Travelers to go ahead and to pay the $100,000 in order to extinguish any and all possibility of liability against its insured Eugene [p.4] Clark, because if we go forward with the trial and we receive a--we're going to be at a blackboard over $20,000 million in damages and that will expose Eugene Clark to that excess judgment when the $100,000 that Traveler originally offered to pay at the very beginning will extinguish all liability

to Eugene Clark, and that's the problem that we're faced with now, and we're asking that Travelers step up to the plate because Eugene Clark is still vicariously liable, despite the fact he was acting in the scope and the $100,000 payment will allow us to avoid this week long trial here with you, Judge, and be able to put this matter to rest.

THE COURT:

Anybody else?

MR. MURNER:

Your Honor, this is Dan Murner on behalf of Dasher and Eugene Clark. As the Court knows, I entered as counsel for Eugene Clark after the Court's order granting the course and scope issue--

THE COURT:

Right.

[p.5] MR. MURNER:

--on their behalf. I am asking and demanding, in fact, on behalf of Eugene Clark that Travelers allow this settlement to go through by offering the full limits to insure that Eugene Clark is protected. Otherwise, I cannot enter into a settlement because I cannot leave Eugene Clark out. As the Court knows, or as counsel for Travelers knows, there was a waiver of conflict signed and that conflict--actually that agreement extends to this trial. It does not extend to other issues, coverage-type issues that exist between these other folks once we're out. So my understanding is that Travelers still has

a duty to defend and protect its insured Eugene Clark, to make sure that he is not exposed to any excess verdict.

THE COURT:

What is Travelers' position?

MS. WILSON:

Travelers position is that Kentucky Farm Bureau came forward and volunteered under Coots $100,000, that by doing that, that Travelers has an issue that has been unresolved at this point since we have not argued our post-trial motions whether or not we would even have to pay that $100,000 on behalf of Kentucky Farm Bureau.

[p.6] MR. GOLDEN:

Judge, Dale Golden again. Now, that completely ignores the fact that if we get a judgment for $20 million, Eugene Clark will owe $20 million. And we're giving them a chance to get Eugene Clark out of this case for $100,000 that Travelers has already offered at the very beginning, so I don't see how that obviates Travelers' obligation and duty to its insured Eugene Clark to get him out at this time for $100,000, rather than exposing him to a several million dollar excess judgment.

THE COURT:

What's any different now than when you offered the $100,000 before?

MS. WILSON:

We felt like that through discovery we learned that he was in the scope of employment. We have an excess policy with Dasher of $10 million that comes into play. And then you also have stacking that comes into play by Kentucky Farm Bureau, maybe up to as much as $10,600,000.

MR. MURNER:

Melissa, that's $5 million.

[p.7] MS. WILSON:

I think it's highly unlikely that there will be a $20 million jury verdict out of Scott County in this case. So the difference is the coverage issue.

MR. MURNER:

Melissa, that's $5 million excess for Eugene Clark, or for Dasher, I'm sorry.

MS. WILSON:

I'm sorry, you're breaking up, Mr. Murner, I can't hear you.

MR. MURNER:

$5 million, Dasher's excess policy.

MS. WILSON:

$5 million in excess.

MR. GOLDEN:

But, we're talking about Eugene being vicariously liable along with Dasher, and that's the problem, and that's why they've offered a million day, because like I said, we can

blackboard over $20 million in damages. And all we need is the hundred from Travelers to put an end to the case to a week trial and to end any potential exposure to Eugene.

[p.8] MS. WILSON:

I spoke at length with my senior partner David Clark and at length with Mr. Briggs, and at this point in time, I don't have any case law where I can tell Travelers that they are liable for this hundred thousand dollars. It's difficult for me to say, Mr. Briggs, you should go ahead and pay this $100,000. I can't tell that to him.

MR. MURNER:

The point was that they were going to pay it initially, so--

MS. WILSON:

That's right, but then Kentucky Farm Bureau came in and substituted. They volunteered their $100,000.

MR. COLSON:

And at that point we had no ruling, although it was our position all along that Mr. Clark was in the course and scope of employment.

THE COURT:

That still doesn't protect him from vicarious liability. And you have some duty to take care of your client.

MR. GOLDEN:

[p.9] There's also an issue of punitives directly against Eugene Clark as opposed to Dasher.

MS. WILSON:

Can you repeat that? Can someone else repeat what Mr. Murner said?

MR. GOLDEN:

There's also an issue of punitive damages directly against Eugene Clark. And also, again, the vicarious liability. If Travelers is going to take the position that it's going to hold onto its $100,000 and make us go through a week long trial, then what I would do, as soon as I get a judgment of over $100,000, which I'm sure I can do, is take an assignment from Eugene Clark and go head over heels toward Travelers to collect 100 percent of that, and take an assignment from Eugene and go after him as hard as I can, and I'm sure Dasher would be glad to hear that as well, because we're talking about saving a week's worth of trial, here.

MR. MURNER:

Additionally, Melissa, the duty to defend is for this trial. According to our waiver of conflict, it's for this trial and it's not for any coverage issues, etc.

MS. WILSON:

That's right.

[p.10] MR. MURNER:

So, that is Travelers' responsibility regarding Eugene Clark. They're going to have to assume the defense there, and are they going to now take a position that they're not going to protect him, but they're going to assume his defense? Is there going to be a reservation of rights? My

position is that Eugene Clark needs to be protected now, and I'm making a demand on his behalf to be protected now by Travelers.

MS. WILSON:

Well, we understand your position, we're very clear on that position.

MR. BRIGGS:

This is Gary Briggs, can I ask a question?

THE COURT:

Sure.

MR. BRIGGS:

What's to prevent this case from settling and Travelers and Kentucky Farm Bureau resolving the issue as to whether we owe them reimbursement?

[p.11] MR. MURNER:

I don't care what Kentucky Farm Bureau and Travelers talk about, as long as Eugene Clark is protected and Dasher is protected from any subrogation-type interests.

MS. WILSON:

Well, either Kentucky Farm Bureau owes it, or we owe it.

MR. BRIGGS:

That's my question. I mean, why can't this case resolve and if there's a ruling that Kentucky Farm Bureau is entitled to the $100,000 from Travelers, we pay it.

MR. GOLDEN:

Well, Kentucky Farm Bureau has already paid it. That is the problem. We want our million dollars, and Dan Murner is telling us that he cannot go above that million, that's his limit. And he's saying that this issue regarding the $100,000 that we've already received from Kentucky Farm Bureau is going to come into play. So it's not a zero sum game. I mean, Guy, can you explain it better than what I'm saying here?

MR. COLSON:

No, I mean, that's the--Melissa, it's Guy Colson.

[p.12] THE COURT:

Can you hear? Excuse me just a second, can you hear him okay?

MS. WILSON:

If he talks a little bit louder, I think I can hear him.

THE COURT:

Okay.

MR. COLSON:

Melissa, this is Guy. The discussions were they wanted to walk out today knowing that Eugene Clark was free of any and all liability. And we may have to call him back for a trial or whatever on the UIM if we go that route, but the issue today is he can't walk out of this courtroom knowing that he's free of liability because Farm Bureau has a subrogatable claim against him under Coots. And so the issue is if

Travelers is willing to pay that and guarantee that it will be paid, then he can be released. But if Travelers can't guarantee that it will pay the hundred thousand, then Mr. Clark walks out of here with a potential of a hundred thousand dollar claim against him under Coots.

[p.13] MS. WILSON:

I still don't understand why we can't settle this now and then litigate the separate issue if we have to pay the $100,000, since you've already paid it.

MR. COLSON:

Well, just of course from Farm Bureau's standpoint, we thought we abided by the law at the time and did the right thing, and we either--Travelers owes it to us, or Dasher owes it to us.

MR. MURHNER:

There's the sticking point, right there. Dasher needs to walk away from this thing free and clear, and if Guy is going to choose both targets, Travelers and Dasher, then I've got to protect them. Additionally, Guy may choose Eugene Clark as the target. So I've got to protect both of those folks and I can't walk away from here without an indemnification agreement for Eugene Clark and Dasher, protection for those.

MR. GOLDEN:

And we have to have the limits, like we've always said, of a million to settle this case from day one, or we're not going to settle. And the only sticking point we've got right now is the

hundred grand that Travelers has already put on the table at the very start and for which they should still put [p.14] on the table because of the vicarious liability. No matter how you cut it, there's vicarious liability between Dasher and between Eugene Clark.

MS. WILSON:

Why can't Dasher indemnify contingent upon post-settlement rulings on who owes this money? Dasher is going to get it one way or the other.

MR. MURNER:

Dasher is not getting any money.

MS. WILSON:

Well, credit for it. You'll get a credit for it.

MR. GOLDEN:

No, we've demanded Dasher's limits. Dasher hasn't paid out anything to anybody yet, and we're demanding the one million dollar limit, and that's Dan's problem. That's all the money he's got, so we've got to have that, and this issue of the hundred thousand dollars with Eugene Clark is a hundred of the limits that Dan has to worry about that we've got to account for, and that's why we need Travelers to put that in, to take away all liability against Eugene Clark and fully satisfy the limits. And then we can settle this case.

[p.15] MS. WILSON:

So, you're saying that the hundred thousand dollars is above and beyond the one million limit.

MR. COLSON:

Well, either that or the Plaintiff has to indemnify them and give up the hundred thousand.

MS. WILSON:

Right.

MR. COLSON:

Because Farm Bureau is just saying please pay us for what we think we did properly.

MR. GOLDEN:

In other words, Dan can't pay his limits and leave Eugene exposed, so it would be deducting a hundred grand off the limits because that may go back to Kentucky Farm Bureau. And I as the Plaintiff, I cannot settle for that because we've demanded limits of the entire million, and the only way Dan can pay that is if he knows that the hundred grand that Kentucky Farm Bureau may take from the limits comes from Travelers and not out of the Plaintiff's pocket, because we're not going to accept $900,000.

[p.16] MS. WILSON:

Right. I'm not saying it should come out of the Plaintiff's pocket. I'm just saying that there should be a way that the Judge can help us to fashion a way that this issue would be heard later, knowing that this hundred thousand

dollars is going to be paid either by Kentucky Farm Bureau or by Travelers.

MR. BRIGGS:

Isn't Mr. Clark an insured under the excess policy, also?

MR. MURNER:

I have no authority from the excess carrier. A million dollars is what we're offering, here.

MR. GOLDEN:

And we've either--we've got everybody here and we've either got to try this case this week, or--and expose everybody to a potential God know what verdict, or if Travelers pays the hundred that it already committed to pay earlier, then we're all done and it's over with, we can all go home.

MS. WILSON:

Well, there's got to be a way that we can work out an agreement that we don't have to decide this issue this moment, because this has not been [p.17] researched and I can't tell Travelers you should pay this. And when I talked to Dave Clark about this, we can't recommend that we pay this on the information we have now.

MR. GOLDEN:

Well, I guess we're going to proceed against Eugene Clark, and if we ring him up, then we're going to take his personal assets and an assignment, and we'll go from there and we'll brief those issues.

MR. MURNER:

And again, Melissa, under the waiver of conflict, you are going to be taking care of Eugene Clark after this trial, it's your--he is your client.

MS. WILSON:

That's right.

MR. MURNER:

So you're going to have to take care of these coverage issues for Eugene Clark, and you're going to be fighting yourself, it sounds like.

MR. GOLDEN:

I mean, Travelers can't say it doesn't have enough information since they've already offered a hundred grand, the case has only gotten a thousand times worse since then as you know, since a million dollars is [p.18] being offered, and our position is going to be that travelers has acted unreasonably and violated the Unfair Claims Settlement Practices Act, and we're going to start going down several different roads if we have to expend our resources and the court's resources to get an excess verdict, plus again, Dasher is going to be exposed, Eugene Clark is going to be exposed, and of course you know my client, George Hofmeister, he's not out there foaming at the mouth to get a million dollars. As a matter of fact, he can live with it either way, he may come out to the better if Eugene is exposed and we have to go through this trial to verdict.

MR. MURNER:

Let me put this to all the intelligent folks in this room here, which I am not one of. What if Travelers agrees to indemnify Eugene Clark and Dasher in the event the Court rules that Travelers owes this money, and you, Dale, indemnify me per our prior discussion. Would that work?

MR. GOLDEN:

Just on the 50.

MR, MURNER:

On the 50.

[p.19] MR. GOLDEN:

Just on the 50.

MR. MURNER:

On the 50, yeah.

MS. WILSON:

Let me repeat this back. For some reason, Dan, the speaker phone breaks you up. You're asking what if Travelers would indemnify Eugene Clark and Dasher if in the event the Court does rule that Travelers owed the $100,000.

MR. MURNER:

No, if Kentucky Farm Bureau gives up the $100,000--either way, Travelers, if they have to pay it, they don't come against Eugene Clark or Dasher. Obviously you can't come against Eugene Clark. And if Kentucky Farm Bureau has to pay it and then seeks to come after

Eugene Clark and Dasher, Travelers protects Eugene Clark--

MR. GOLDEN:

They've already paid it. You see, Kentucky Farm Bureau has already paid a hundred. You see, we've taken that into consideration in demanding a million limits.

[p.20] MR. MURNER:

I understand that. If they don't get it back, if they can't collect, it. Well, if they can't collect it, then they can't come after--yeah, they could, they could come after Eugene Clark under the Coots, so I've got to protect him under Coots. So Travelers would then step into our shoes and pay $100,000, or litigate it with them or whatever you want to do, but you protect Eugene Clark, you're insured, and Dasher from having to pay that.

THE COURT:

And you get your money up front.

MR. MURNER:

You get your million dollars, you indemnify us against the 50. If Guy loses and owes the hundred thousand which he's already paid, he goes after Dasher or Travelers. If Travelers loses, they can't come after Dasher, you know, they promise to protect Dasher, and they don't go after Eugene Clark, their insured, which they're not going to do anyway, but--

THE COURT:

Did you understand that, Melissa?

MR. MURNER:

Do you all understand? Is that working for anyone?

[p.21] MR. WILSON

I only could hear parts of that, so if you could just summarize, that would be helpful.

THE COURT:

I don't know that I can summarize it.

MR. MURNER:

Well, this is my--Mike Hammond was the one who came up with that idea.

MR. GOLDEN:

Go over it one more time, Dan.

THE COURT:

Dan, step right next to the phone, here. I think that's the problem.

MR. MURNER:

Okay. Right now, Dale and I have this tentative agreement that the PIP issue is not a problem. He's going to protect us against the PIP issue, okay? So, that's--we're talking about $100,000. Right now, it looks like a fight between Kentucky Farm Bureau and Travelers, who has to pay this.

MS. WILSON:

Right.

[p.22] MR. MURNER:

This deal would say that if the Court rules that Kentucky Farm Bureau voluntarily paid that, then they go looking for their subrogation interest, they come after Eugene Clark or Dasher or Cincinnati Insurance Company, and we are protected by Travelers. Travelers says, okay, if you win, Kentucky Farm Bureau, we'll have to pay you. Now, if Kentucky Farm Bureau wins, then Travelers can't go after Dasher, Cincinnati or Eugene Clark. Follow me?

MS. WILSON:

If Kentucky Farm Bureau wins--

MR. MURNER:

And they don't owe this money and Travelers needs to pay Kentucky Farm Bureau, then Travelers agrees not to go after Cincinnati and Dasher and Clark.

MS. WILSON:

Yes.

[p.23] MR. MURNER:

If Kentucky Farm Bureau loses and they come after Eugene Clark, or Cincinnati Insurance Company or Dasher, then you all step in and defend us and indemnify us, protect us basically.

MS. WILSON:

Yes.

THE COURT:

So actually, it's a way to get your $100,000 on the table and then my decision will determine who is responsible.

MS. WILSON:

Yes.

MR. MURNER:

I guess what I'm driving at here is I want to make sure that Cincinnati Insurance Company doesn't have to pay any more money, either in judgment or defense costs or anything, we're completely out of this thing.

MS. WILSON:

Right.

[p.24] MR. MURNER:

That's the intent and that's what I'm telling everybody here, that's the intent and we've got to draft this thing so that Cincinnati is completely out, so is its insureds and Eugene Clark.

MR. COLSON:

And the excess--well, the excess wouldn't enter into it.

MR. GOLDEN:

And, Dan, you will be paying the Plaintiffs a million dollar check within two weeks.

MR. MURNER:

Yes, give me the W-9 form and I'll hustle it up there and tell them to pay it.

THE COURT:
Is that something that Travelers can live with?

MR. MURNER:
I mean, that's the best I can do.

MS. WILSON:
Yes, I think that's what we wanted, was that–

[p.25] THE COURT:
Okay, did you hear that?

MS. WILSON:
--this issue could still be decided. At the same time, we don't want to interfere with a settlement offer from Dasher and we don't want Mr. Hofmeister and Mr. Clark to have to go through a weeklong trial over this one issue. And I can't in all fairness -

THE COURT:
Nor the Judge, either, I might add.

MS. WILSON:
And the Judge, either. And the Judge, either.

MR. GOLDEN:
Melissa, this is Dale, we appreciate your help.

MS. WILSON:
I wish that I could have expedited things without a conference call, but this is, I think, most fair and if you all will draft it up I will have a look at it and get it signed, and Mr. Briggs, do you have a question?

MR. BRIGGS:

[p.26] Yes, I want to make sure I understand what it is that's being agreed to. What's being agreed to, as I understand it, is Kentucky Farm Bureau and us are in dispute as to who owes the $100,000, correct?

MR. COLSON:

That's correct. The amount of money is only $100,000. And the issue is does Farm Bureau get it from Travelers, get it from Clark, get it from Dasher, get it from Cincinnati, or the excess carrier Fireman's Fund. And what I understand the agreement will be is that Travelers, if it's determined Farm Bureau could get it from anybody, Travelers will pay the money on that person or entity's behalf.

MR. BRIGGS:

And Melissa, that is your recommendation that that's what we should agree to?

MS. WILSON:

The reason is because--

MR. BRIGGS:

I'm just--that's your recommendation to us?

[p.27] MS. WILSON:

Yes, because I want to try to keep Mr. Clark from having any personal exposure.

MR. BRIGGS:

I just want to be clear that we're only talking about a hundred thousand.

MS. WILSON:
Yes. But what we're giving up is the right to go after Dasher for that.

MR. BRIGGS:
I understand.

MR. MURNER:
Cincinnati or the excess carrier.

MS. WILSON:
That's right.

MR. BRIGGS:
I understand.

MS. WILSON:
I think--that's what I recommend.

MR. BRIGGS:
Okay.

[p.28] THE COURT:
Okay, is everybody acceptable with that?

MR. MURNER:
Okay, Your Honor, my position is--and if I'm wrong, somebody tell me now. Cincinnati, excess carrier, Dasher and Clark are protected, are free and clear from--

THE COURT:
I don't know what anybody else thinks, but I am clear on that, for whatever it is worth.

MR. MURNER:

Okay, the final issue is, as we talked about before, our settlement negotiations, we wanted to keep them confidential.

MR. COLSON:

I want to make one thing real clear. Melissa, I want to make certain of this, that's why you ought to go on and pay the hundred. Of course, our policy with Mr. Hofmeister says, okay, I may have to try it, but it also says that he will hold money in trust for us for any monies we have paid. So what I'm saying is we could go to the Judge, we could argue the policy [p.29] and say he's received "X" money, we've paid a hundred thousand, we can't get it from anybody else, so Mr. Hofmeister, you have to pay us.

MR. GOLDEN:

No, wait a minute now

MR. COLSON:

But what I'm saying is, Travelers, I want them to understand they're agreeing that if we get the Judge to rule that either Clark pays it, Travelers pays it, Cincinnati pays it, Fireman's Fund pays it, or Hofmeister pays it, they will pay it.

MR. GOLDEN:

Right, Hofmeister will never have to pay it. Only if it's–

MR. COLSON:

That's right. That's the agreement, that's right we're only dealing with--but I want to

understand there's five entities here that Farm Bureau might be able to point to any one of the five and convince the Court, either this Court or the Court of Appeals or somebody that we ought to get the money back and in that case, Travelers, regardless of who we point the finger at and hit, will pay it on behalf of either Hofmeister, Dasher, Cincinnati, Fireman's Fund, or Clark.

[p.30] THE COURT:

Okay, is that your understanding, Melissa?

MS. WILSON:

What do you think, Mr. Briggs? Do you and I need to pow-wow before we agree to this, privately?

MR. BRIGGS:

Well, again, we're--yes, we do.

MS. WILSON:

Can you all please give us the indulgence of another five minutes.

THE COURT:

Yes, just call my office.

MS. WILSON:

May I please have the number to call?

THE COURT:

You're in Lexington, right?

MS. WILSON:

Yes, sir.

THE COURT:

863-4781.

[p.31] OFF THE RECORD

MR. GOLDEN:

I want to make sure that--once again, this is Dale Golden on behalf of the Plaintiffs talking to Dan Murner on behalf of his clients, that we get a million dollars, a million dollar check within two weeks if humanly possible, that the only thing that we agree that we may have to pay back is the $50,000 PIP claim, but that we are given all authority and right, assignments, or whatever necessary so that we can argue to the Judge that we don't owe it, so that the other side can't say that Dale Golden doesn't have standing to come in here and argue against this, and in an event the argument is lost, then we will pay it. We've agreed that we will pay it, but we just want the right to argue that motion, and that's part of our settlement agreement, am I right?

MR. MURNER:

Well, now, we've talked about this assignment and said we were going to ask the Court to rule that you would have the right to do this, the right to pursue this action. That way I'm not waiving anything, and if this bad faith thing is out there, I don't want to volunteer any of my information in this case to you for your purposes of pursuing this action.

[p.32] MR. GOLDEN:

Well, we can just ask Guy Colson right here on behalf of Kentucky Farm Bureau if it's Kentucky Farm Bureau's position that I can at least brief it and argue it.

MR. COLSON:

I have no problem with that.

MR. GOLDEN:

Regarding the $50,000. Well, there we go, it looks like we've got an agreement. We'll get copies of the policies through discovery, we'll read them, we'll argue it.

MR. COLSON:

Standing will not be a defense.

MR. GOLDEN:

Okay. All right, as long as I have the right to argue it and at least try to keep from paying it. All right.

THE COURT:

So, are we just waiting for Melissa to call?

[p.33] MR. MURNER:

Let me go back to the two weeks, Dale. We need to put this on pause while I call to see if we can get it, if it's possible. I don't want to promise--I didn't hear the two weeks thing until after I talked to my folk.s.

MR. GOLDEN:

We're not going to hold, I mean--

MR. MURNER:

I'm going to push. As soon as you send me the W-9, it goes out the same day to Cincinnati Insurance Company with a request.

MR. GOLDEN:

You just give me the Marine effort on the two weeks, and that will be good enough.

THE COURT:

I heard that and I will hold him to it.

OFF THE RECORD

MR. GOLDEN:

Okay, this is Dale Golden, attorney for the Plaintiffs, and my agreement in settling this case is that Dasher will tender a settlement draft in the amount of $1 million, hopefully within two weeks or as soon thereafter as [p.34] possible. That of the $1 million, $50,000 of it which represents money paid for medical bills for which a PIP lien may exist, that in the event the Court rules that Kentucky Farm Bureau gets back the $50,000, that Plaintiff's counsel will pay the $50,000. And it's my understanding from Kentucky Farm Bureau's attorney that he is not going to contest my ability as Plaintiff's counsel to have standing for the right to contest that payment and to brief the issue and to bring it before the Court where the Court can decide.

And Kentucky Farm Bureau's attorney Guy Colson is here, and is that right, Mr. Colson?

MR. COLSON:

That is correct with the other proviso that if I can get that money, for example, I believe the way this is coming down only from the excess carrier, then obviously you will not have to pay the $50,000.

MR. GOLDEN:

Right. All right, and then Dan Murner, counsel for Dasher--

MR. MURNER:

My understanding is that Travelers Insurance has agreed to indemnify, hold harmless and defend any parties with the exception of Kentucky [p.35] Farm Bureau, for any claims for the $100,000 under insured motorist substitution payment by Kentucky Farm Bureau should there be a claim for same against any of those parties. My understanding is that there are no other liens existing out there, is that correct?

MR. GOLDEN:

That's my understanding.

MR. MURNER:

For example, Mr. Hofmeister's total medical bills have been paid by his PIP carrier.

MR. GOLDEN:

That's my understanding.

MR. MURNER:

To the extent these are any other liens existing now or in the future, is it your understanding

that we are protected from any such liens? For example, if he had submitted it to his own personal health insurance carrier.

MR. GOLDEN:

I'm not aware of any and we're settling the case for a total of a million, so--

[p.36] MR. MURNER:

What I want to make sure is that this is a complete release. I mean, this is the standard complete release with the exception of these workings with the parties.

MR. GOLDEN:

I agree.

MR. COLSON:

We do need to put a proviso in there, Ms. Court Reporter, that Travelers believes that the payment that Farm Bureau made, they made voluntarily.

MR. MURNER:

Also, we would like that to be, the release agreement and the settlement agreement be kept confidential. To the extent the Court can, we would ask that the transcript of these proceedings today be kept either under seal or somehow confidential.

THE COURT:

Just submit an order sealing them subject to further orders of the Court, and I'll sign it.

MR. MURNER:
Thank you.

[p.37] MR. GOLDEN:
And I agree on behalf of the Plaintiffs that, just like the Judge said, that they be sealed subject to further orders of the Court.

MR. MURNER:
Correct. And I would say if someone needs them and has to unseal them, they have to move to unseal them, and the Court will address that as long as all interested parties are noticed.

THE COURT:
Oh, yes, they'd have to be noticed.

MR. GOLDEN:
Okay.

THE COURT:
Okay, thank you all very much.

OFF THE RECORD

[p.38] I, JACQUELYN J. HATCHER, a Notary Public in the Commonwealth of Kentucky, do certify that the foregoing testimony was taken by me at the time and place and for the purpose stated in the caption; that said testimony was first taken down by me in shorthand and later transcribed by me and that the foregoing 37 pages of typewritten matter constitute a true and correct copy of all requested testimony taken down by me in the above styled cause of action.

Witness my hand and notarial seal this November 5, 2002.

/s/ Jacquelyn J. Hatcher
Official Court Reporter

My Commission expires: 10/4/06

APPENDIX K

GOLDEN & WALTERS
ATTORNEYS AT LAW
1025 MONARCH STREET, SUITE A-101
LEXINGTON, KENTUCKY 40513

June 22, 2000

J. DALE GOLDEN

TELEPHONE (606) 219-9090
FACSIMILE (606) 219-9292

Daniel E. Murner
Landrum & Shouse
Post Office Box 951
Lexington, Kentucky 40588-0951

Re: **George and Kay Hofmeister vs. Eugene Clark, Kentucky Farm Bureau Mutual Insurance Co., and Dasher Express, et al.** Scott Circuit Court; Civil Action No. 00-CI-00030

Dear Dan:

I am in receipt of your June 22, 2000 correspondence regarding the above-referenced matter. Please be advised that your proposed settlement offer is rejected and that we hereby withdraw our offer to settle this matter for the policy limits of $1 million. In regard to your proposed settlement, I have some concerns.

You assert that Dasher has a strong liability defense because Mr. Clark was not acting within the scope of his employment. I have already presented to your office the applicable case law that clearly indicates Mr. Clark was acting within the scope of his employment. The position you have taken is a clear violation of the Unfair Claims Settlement Practices Act because liability has become clear.

You have indicated that the proof in the case indicates that Mr. Hofmeister was at fault in causing the accident. This position by Cincinnati Insurance Company is so contrary to the facts of the case that it constitutes a violation of the Unfair Claims Settlement Practices Act.

Although you acknowledge that we have a viable claim for lost wages, lost profits, and lost business opportunities, you did not offer a dime to settle that portion of our claim. Ths, too, is in violation of the Unfair Claims Settlement Practices Act.

We will now proceed to trial and have the jury decide the issue of damages. Cincinnati insurance Company's offer of $109,275.00 in a case which has an economic loss of over $5 million is completely unreasonable.

Sincerely,

/s/
J. Dale Golden

JDG/dbj

[Defendant's Exhibit 6]